

KAUA'I PLANNING COMMISSION
CONTESTED CASE CALENDAR
May 9, 2017

The contested case calendar of the Planning Commission of the County of Kaua'i was called to order by Vice Chair Ho at 9:59 a.m., at the Lihu'e Civic Center, Mo'ikeha Building, in meeting room 2A-2B. The following Commissioners were present:

Vice Chair Roy Ho
Ms. Donna Apisa
Mr. Wade Lord (*left at 1:56 p.m.*)
Mr. Sean Mahoney
Ms. Glenda Nogami Streufert

Absent and Excused:
Chair Kimo Keawe
Ms. Heather Kanoe Ahuna

The following staff members were present: Planning Department – Duke Nakamatsu, Leslie Takasaki; Office of the County Attorney – Deputy County Attorney Peter Morimoto; Office of Boards and Commissions – Commission Support Clerk Darcie Agaran

Discussion of the meeting, in effect, ensued:

CALL TO ORDER

Vice Chair Ho called the meeting to order at 9:59 a.m.

CALENDAR

Petitioners Kirby B. Guyer and Milton Searles' Motion to Disqualify Hearing Officer, Declaration Jonathan J. Chun; Certificate of Service (related to Application for a Use Permit, Special Management Area Permit and Class IV Zoning Permit on Property Situated at Hā'ena, Kaua'i, Hawai'i identified by Kaua'i TMK No. (4)5-8-012: 22 containing a total area of 11,827 square feet.) [Deferred 12/13/16, deferred 2/28/17.]

Petitioners John R. Hoff Trust and Lorna E. Hoff Trusts' Motion to Disqualify Hearing Officer; Declaration of Jonathan J. Chun; Certificate of Service (related to Appeal Decision of Planning Director Relating to the Notice of Violation and Order to Pay Fines Related to Use Permit U-2015-28, Special Permit SP-2015-9 and Class IV Zoning Permit Z-IV-2015-29 on Property Situated at Lāwa'i, Kaua'i, Hawai'i, identified by Kaua'i TMK No. (4) 2-5-005: 080 CPR Unit 1 containing a total area of 1.032 acres. (contested case files CC-2015-18, CC-2016-7) [Deferred 12/13/16, 2/28/17.]

Petitioners Lloyd R. Fischer and Shirley E. Fischer's Motion to Disqualify Hearing Officer; Declaration of Jonathan J. Chun; Certificate of Service (related to Petition to Appeal Decision of Planning Director Relating to the Forfeiture of Non-Conforming Use Certificate TVNCU #5003 for Property Situated at Kekaha, Kaua'i, Hawai'i, identified by TMK No. (4)1-3-001: 88 containing a total area of 12,453 sq. ft. (contested case files CC-2016-9, CC-2016-10) [Deferred 12/13/16, deferred 2/28/17.]

Petitioner Todd Schirm's Motion to Disqualify Hearing Officer; Declaration of Jonathan J. Chun; Certificate of Service (related to Petition to Appeal Decision of Planning Director Relating to the Forfeiture of TVNCU # 5138 (Hale Cook) for Failure to Renew for Property Situated in Wainiha, Kaua'i, Hawai'i, identified by Kaua'i TMK No. (4)5-8-009: 8 CPR Units 1 and 2 containing a combined total area of 11,250.0 sq. ft. (contested case file CC-2015-24) [Deferred 12/13/16, deferred 2/28/17.]

Petitioners Brysone K. Nishimoto and Catherine J. Nishimoto's Motion to Disqualify Hearing Officer; Declaration of Jonathan J. Chun; Certificate of Service (related to Petition to Appeal Decision of Planning Director Relating to the Forfeiture of TVNCU #1171 (Ivy's Place) for Failure to Renew for Property Situated in Wainiha, Kaua'i, Hawai'i, identified by Kaua'i TMK No. (4) 5-8-004: 26 containing 8.343 acres.) (contested case file CC-2015-23) [Deferred 12/13/16, deferred 2/28/17.]

Petitioner Michael Chandler's Motion to Disqualify Hearing Officer; Declaration of Jonathan J. Chun; Certificate of Service (related to Petition to Appeal Decision of Planning Director Relating to the Forfeiture of TVNCU # 4222 (Hale O Lani) Related to Special Permit SP-2012-1 for Failure to Renew for Property Situated at 3239 A Kalihiwai Road, Kīlauea, Kaua'i, Hawai'i, identified by TMK No. (4)5-3-003: 45 containing an area of 74,923 sq. ft.) (contested case file CC-2016-4) [Deferred 12/13/16, deferred 2/28/17.]

Petitioners John Wark and Shannon Wark's Motion to Disqualify Hearing Officer; Declaration of Jonathan J. Chun; Certificate of Service (related to Petition to Appeal Decision of Planning Director Relating to the Forfeiture of TVNC #4219 ('Anini Kai) related to Special Permit SP-2011-13 for Failure to Renew for Property Situated at 3525 'Anini Road, Kīlauea, Kaua'i, Hawai'i identified by TMK No. (4)5-3-004: 29 containing an area of 13,608 sq. ft.) (contested case file CC-2016-5) [Deferred 12/13/16, deferred 2/28/17.]

Petitioners Parnell H. Kaiser and Michele L. Kaiser's Motion to Disqualify Hearing Officer; Declaration of Jonathan J. Chun; Certificate of Service (related to Application for a Use Permit, Special Management Area Permit and Class IV Zoning Permit on Property Situated at Hanalei, Kaua'i, Hawai'i, identified by Kaua'i TMK No. (4)5-5-004: 15 containing a total area of 6,046 sq. ft.) (contested case file CC-2015-15) [Deferred 12/13/16, deferred 2/28/17.]

Motion to Disqualify Hearing Officer; Certificate of Service (related to Petition to Appeal of Planning Director; and Application for a State Special Permit, etc. (Consolidated

Cases) by Michael Levy and Alexis Boilini, Trustees of the Levy-Boilini Living Trust (contested case CC-2015-14, CC-2016-1) [Deferred 12/13/16, deferred 2/28/17.]

Petitioner's Steven and Eddi Henry Motion to Disqualify Hearing Officer; Certificate of Service (related to Petition for Appeal of Decision of Planning Director; and, Application for a State Special Permit, etc.) (contested case file CC-2016-11) [Deferred 12/13/16, deferred 2/28/17.]

Petitioner's William I. Cowern and Catherine F. Cowern Motion to Disqualify Hearing Officer; Certificate of Service (related to Petition to Appeal Decision of Planning Director; and, Application for a State Special Permit, etc. (Consolidated Cases) (contested case files CC-2015-17, CC-2016-2) [Deferred 12/13/16, deferred 2/28/17.]

Petitioner Anthony S. Bardin Motion to Disqualify Hearings Officer; Declaration of Sommerset K.M. Wong; Certificate of Service (related to Petition to Appeal Decision of Planning Director Relating to TVRNCU #1225 for Property Situated in Hanalei, Kaua'i, Hawai'i, identified by Kaua'i TK No. (4)5-5-010: 39 containing 5,654 sq. ft.) (contested case file CC-2013-83) [Deferred 12/13/16, deferred 2/28/17.]

Petitioner's Greg Allen, Sr., and Greg Allen, Jr. Motion to Disqualify Hearings Officer; Declaration of Sommerset K.M. Wong; Certificate of Service (related to Petition to Appeal of Violation and Levi of SMA Fines Involving Property Situate in Kīlauea, Kaua'i, Hawai'i, identified by Kaua'i TMK No. (4)5-3-007: 14, and containing a total area of 16,552.0 sq. ft.) (contested case file CC-2015-4) [Deferred 12/13/16, deferred 2/28/17.]

Petitioners Thomas J. Brooks and Jennifer S. Brooks' Motion to Disqualify Hearings Office; Declaration of Jonathan J. Chun, Certificate of Service (1/30/17) (related to Petition to Appeal Decision of Planning Director Relating to the Forfeiture of Non-Conforming Use Certificate TVNCU #4291 (Pohaku), TMK No. (4)58008021, Hā'ena, Kaua'i.) (contested case file CC-2017-1) [Referred to Hearings Officer 1/24/17.]

Vice Chair Ho: We will proceed with the second half of our Planning Director's [sic] meeting today. First off...

Ms. Nogami Streufert: I move that we go into executive session to consult with our attorney on the powers, duties, and responsibilities of the Commission in the following contested cases.

Vice Chair Ho: Motion on the floor. Is there a second?

Ms. Apisa: Second.

Vice Chair Ho: Discussion? Motion has been made and seconded. I need a roll call vote, please. I will take it. Commissioner Apisa.

Ms. Apisa: Yes.

Vice Chair Ho: Commissioner Lord.

Mr. Lord: Yes.

Vice Chair Ho: Commissioner Mahoney.

Mr. Mahoney: Aye.

Vice Chair Ho: Commissioner Streufert.

Ms. Nogami Streufert: Aye.

Vice Chair Ho: Five (5) ayes. It passes. Motion carries 5:0. We are in executive session.

The Commission entered into Executive Session at 10:00 a.m.

The Commission reconvened in Open Session at 10:20 a.m.

Vice Chair Ho: We're back in session again. Ladies and gentlemen, let me make this announcement, please. It is my intention to have the hearing proceed as follows. First, the parties will present their evidence; applicants will go first, followed by the Department. Parties will present their closing arguments. At conclusion, I will ask the parties to submit proposed written Findings of Fact, Conclusions of Law and Order. Please bear with me because I know – as professionals – you know this, we do not, so I'm just trying to make the roadway paved a little better. The Commission members will have an opportunity to ask questions of the attorneys, witnesses, all present. I will allow a follow-up question or maybe a third follow-up question, but I ask that you please do not try to get into a discussion with the party involved. You may ask Mr. Morimoto a question any time; recognize we take a short recess and you can huddle with Mr. Morimoto. This would be a one-on-one deal, not a group discussion. When all evidence has been presented, the parties will argue; applicants will go first. And I don't know if I have to ask you if you want to reserve some time for rebuttal, but you can at the time. I guess that's as far as I will go on this. I will turn the meeting over to Mr. Morimoto and we will continue.

Deputy County Attorney Peter Morimoto: If the parties want to proceed with a presentation of evidence, I'm not sure who will be going first, but...or who will be calling the witnesses.

Jonathan Chun: Good morning. Jonathan Chun. Yeah, we understand those procedures; those would be fine. I think we will be following...that's what we will be followed by the parties. Just one small matter, there was a stipulation that was circulated, signed by the County and some of the parties, regarding one (1) other appeal that was filed subsequent to the hearing starting, and that was regarding a...what was the name? Not Bancroft, but...it escapes me, but there was one (1) other party that was an appeal that was filed; a motion to disqualify was filed. The County signed the stipulation to bring that into these hearings and the Intervenors also agreed to that, but I just wanted to bring that to the attention of the Chair. When we get it signed, we are going to be submitting that for the Chair's consideration. Basically, it's just so that we don't...when that one comes in front of the Commission, we don't have to redo everything again with the witnesses, and I think that was the idea with... Yes, it was the Brooks' case. Thanks.

But there was an agreement by all the parties to bring that. We just don't have the formal signed stipulation yet, but I wanted to let the Commission know that the parties were in agreement to bring Brooks into that so if and when Brooks becomes set for a hearing in front of this Planning Commission, you don't have to redo everything again.

Vice Chair Ho: Are you the representative, Mr. Chun?

Mr. Chun: Yeah, I'm representing Mr. Brooks, but we needed to get it signed because it involved all these hearings. We needed it to get signed by the Intervenors, by the County, the individual County Deputy's handling all the other individual cases. We circulated it. I think we just need to get the attorneys from O'ahu to sign, which I believe they have or will be doing that soon. But once it is, we will be submitting that for the Commission's consideration. And again, the idea was so that we don't have to redo Brooks again when the time comes.

Also, just to give the Commission a heads up, it's a similar situation with two (2) more appeals that were actually filed after these and (inaudible) regarding Alexandra Fulk and she has two (2) TVRs, also. But because the Commission has not yet assigned that one to a Hearings Officer, that one could not be part of this stipulation. But the idea is still the same and we'll be talking with the County Attorney's Office that when the Hearings Officer...if assigned, that issue raises, then we'll be asking the County, will they be willing to stipulate to that, also. Again, with the idea of avoiding having to call the witnesses again and have them saying the same thing again, have their arguments again. By then, the Commission might have ruled on this one; so to avoid repetitiveness. I just wanted to give a heads up to the Commission on that.

Vice Chair Ho: Thank you.

Mr. Morimoto: For the record, will the parties waive reading of the individual matters and stipulate that the hearings today will encompass the items listed on the calendar filed on May 3, 2017?

Mr. Chun: Yeah, at least from my clients' perspective, we would agree and stipulate that the notices of the hearing for today were proper. I can't speak for the other applicants that I don't represent. Okay, yeah. So we can have them come up if you—

Mr. Morimoto: Yes, please.

Barry Edwards: I agree.

Greg Kugle: And I agree, too. Thank you.

Mr. Morimoto: Thank you.

County Attorney Mauna Kea Trask: On behalf of the Department, we would as well.

Mr. Chun: Yeah. The only thing, when we add...I think between the County and ourselves, I think we agreed that on our final arguments, the Commission was going to call each case one-by-

one and we were going to try to consolidate. So whenever that time comes and we'll try to handle it that way. And from our side, all the ones that I was going to handle were just going to be called at...all those at one time and I was going to speak for all of them at one time.

Mr. Morimoto: Thank you.

Mr. Chun: Right. But we just wanted to make sure when that time comes, we get on the record which ones I'm speaking for and which ones the other attorneys are speaking for.

Mr. Morimoto: Thank you.

Mr. Trask: And for the record, Mauna Kea Trask, County Attorney. On behalf of the Department in the various cases, we're fine with the procedure as outlined by the Chair and we would just say that a lot of these arguments are going to be common between all of them, but at closing, I suppose, I would make...I'm only taking one (1) case in front of you today and I have some arguments that don't apply to others, but then the other deputy's will be making their closing arguments, if they so choose. We won't necessarily argue all of them, but they may have their own points.

Mr. Chun: And the parties did agree in that stipulation to try to limit repetitiveness.

Mr. Trask: Correct.

Mr. Chun: Repetitive arguments.

Mr. Morimoto: And don't feel compelled to argue. You can all waive your closings if you so choose. (Laughter in background)

Mr. Chun: Well, yeah, I mean, because the Chair outlined that you can do proposed Findings of Fact, Conclusions of Law, then maybe...and I can't speak for the other attorneys, but that might be a way of doing it also.

Mr. Trask: I'm sorry. I'm a Trask. I have to say something. (Laughter in background)

Mr. Chun: But anyway, so yeah, we're ready to proceed.

Mr. Morimoto: Then why don't you call your first witness.

Mr. Chun: On behalf of my clients and the other applicants, we would call Myles Hironaka.

If I may ask, at the last hearing, Mr. Chair, there were exhibits that were handed out; I think by both the County and the applicants. Do the Commission members have that? I believe all those exhibits were stipulated into evidence. That was my recollection; we all agreed to each other's exhibits.

Vice Chair Ho: I believe we do, Mr. Chun.

Mr. Chun: Oh, you do. Okay. Yeah, because we have ones that are A through O, I believe, or something like that.

Mr. Morimoto: A through T?

Mr. Chun: Yeah, ours is A through...we have R. No, T, U; up to U. Do you have those? If not, we have copies now.

Mr. Trask: So we have A through T.

Mr. Chun: U, yeah?

Mr. Trask: What's U?

Mr. Chun: U was signed Contract 8741.

Mr. Trask: Okay.

Mr. Chun: If you don't have it, we can...I can...I have copies.

Mr. Morimoto: Okay, great.

Mr. Chun: If I may?

Mr. Morimoto: Yes.

Vice Chair Ho: Mr. Chun, are you ready?

Mr. Chun: Yes.

Vice Chair Ho: Mr. Mauna Kea, are you—?

Mr. Morimoto: Before we proceed, I was comparing the exhibit lists that you provided to us.

Mr. Chun: Right.

Mr. Morimoto: And the one that was previously submitted by stipulation, and it doesn't seem to match up.

Mr. Trask: I think...I don't know if we stipulated to Petitioners' exhibits. I know we stipulated to the Joint Stipulation of Exhibits, but...and it looks like they are a little different, but it looks also, too, there's some similar.

Mr. Chun: Yeah.

Mr. Morimoto: Would you mind taking a moment to check the exhibit list and make sure that you're both okay with admitting?

Mr. Chun: Sure. If we could take a short 5-minute...

Mr. Morimoto: Sure.

Mr. Chun: Then Mauna Kea and I will...

Vice Chair Ho: We will recess for five (5) minutes.

The Commission recessed this portion of the meeting at 10:32 a.m.

The Commission reconvened this portion of the meeting at 10:41 a.m.

Vice Chair Ho: Alright.

Mr. Chun: Thank you, Mr. Chair.

Vice Chair Ho: Call this back in...session in order.

Mr. Chun: Mr. Trask will read off the duplicate ones and then the stipulations. Go ahead.

Mr. Trask: Thank you, Chair. In looking at Petitioners' list of exhibits, some are...largely they are all government records, so those that aren't included in our previous ones, we'll stipulate to. I'll leave it to you as far as how you want to refer to these because the rest really don't line up, so if you want to just enter into evidence the ones that currently--

Vice Chair Ho: Excuse me, Mauna Kea. Where are you on the pages?

Mr. Trask: I'm just looking at...yeah, the one for today. And I don't know if you want...however you want to do it. However, the Department would not object to you...because the Joint Exhibits are referenced by letter, capital letter, the Department would not object to this Commission referring to these as numbers and entering, maybe, only ones that are currently not included as...stipulating to those and they'll be listed as numbers, and the rest...you know, we wouldn't object if we just rely on ours because it could get confusing.

Mr. Morimoto: So can you tell us which ones from the--

Mr. Trask: Yes, I will.

Mr. Morimoto: Okay.

Mr. Trask: As far as the Petitioners' list of exhibits, Exhibit A is not included in the stipulated Joint Exhibits, so we would --

Mr. Morimoto: Can we make that 1?

Mr. Trask: Yeah, we can make that 1; that's fine.

Mr. Chun: Okay.

Mr. Trask: Exhibit B is the Stipulated Exhibit A. Exhibit C has not been stipulated in, so we are willing to stipulate to it though.

Mr. Morimoto: So we'll make that 2.

Mr. Chun: Okay.

Mr. Trask: Exhibit D we will stipulate and make that 3. Exhibit E is stipulated Joint Exhibit B. Exhibit F has not been stipulated to and we can label it 4. Exhibit G has been stipulated as D. Exhibit H is stipulated as E. Exhibit I has been stipulated as F. Exhibit J has been stipulated as G. Exhibit K has been stipulated as Exhibit J. Exhibit L has been stipulated as K. Exhibit M has been stipulated as L. Exhibit N has not been stipulated to, so we'd be fine to list it as 5. Exhibit O has not been stipulated to, so we can label that as 6. Exhibit P has been stipulated as Exhibit M. Exhibit Q has been stipulated as Exhibit N. Exhibit R has not been stipulated to, so we will be willing to stipulate as 7. Exhibit S has been stipulated as O. Exhibit T has been stipulated as I. And Exhibit U has been stipulated as P.

And just as a matter of the record, at this time, prior to having Mr. Hironaka testify, we would invoke witness exclusionary rule to anyone who may be in the audience that aren't parties, I suppose.

Mr. Morimoto: Are there any witnesses in the audience who are not parties to the proceeding?

Mr. Chun: For the record, I don't see any other witnesses.

Mr. Morimoto: Okay.

Mr. Chun: So what we are going to do, I gather, is the exhibits are going to be put in as the Joint Exhibits A through...what, T, yeah? And then the other ones today are to be renumbered as 1 through 7 and we will be stipulating those into evidence.

Mr. Morimoto: So there would be--

Mr. Chun: The renumbered, yeah.

Mr. Morimoto: Okay. Did the Commission have that?

Mr. Chun: We can go through the numbers if you want again, just to correspond...

Mr. Morimoto: I think that's good.

Mr. Chun: Okay, so we would call Myles Hironaka at this point in time.

Vice Chair Ho: Myles, I have to swear you in. Do you swear to tell the truth, the whole truth, and nothing but the truth?

Myles Hironaka: I do.

Vice Chair Ho: Please be seated.

Mr. Chun: If I may, Mr. Chair, then; continue. Thank you. Please state your name.

Mr. Hironaka: My name is Myles Hironaka.

Mr. Chun: And Mr. Hironaka, what is your position with the County of Kaua'i?

Mr. Hironaka: I'm a Planner VII.

Mr. Chun: Okay. And as a Planner VII, in regards to these hearings, what's your responsibilities?

Mr. Hironaka: Pretty much just doing more logistical things with the hearings.

Mr. Chun: Okay. Logistical meaning...I guess the payments of the contract and so on and so forth?

Mr. Hironaka: Correct. Correct.

Mr. Chun: Okay. So you are familiar with the contracts for the Hearings Officer by the Planning Department?

Mr. Hironaka: For Mr. Kimura?

Mr. Chun: Yes, Mr. Kimura. Sorry.

Mr. Hironaka: Yes.

Mr. Chun: And Mr. Kimura currently has two (2) contracts with the Planning Department?

Mr. Hironaka: Correct.

Mr. Chun: Okay. I'm going to...if I may? Mr. Hironaka, I'm going to show you some exhibits here and they're not relabeled (laughter), but I'll try to...I'll refer to them as originally labeled and what we're going to be calling it as far as...if I may approach the witness? Thank you.

Ms. Apisa: Do you want to trade copies so it's labeled?

Mr. Chun: Myles can figure it out. Can you, Myles?

Mr. Hironaka: I'll try. (Laughter)

Mr. Chun: Okay, thanks. Myles, turn your attention to Exhibit G, which you have in front of you, which is the Joint Exhibit D, as in dog. Oh, sorry, not G. What was that? Oh, J, sorry. I'm looking at... (Laughter) I'm getting confused which one. Okay, J, which is Exhibit G under your joint ones. Do you have that in front of you, Myles?

Mr. Hironaka: Is this the Contract 8599?

Mr. Chun: Correct.

Mr. Hironaka: Okay.

Mr. Chun: Okay.

Mr. Hironaka: Yes, I do.

Mr. Chun: And that's one of the contracts that is now being held by Mr. Kimura?

Mr. Hironaka: Correct.

Mr. Chun: Okay. So the work under this contract, Exhibit J, is for a Hearings Officer?

Mr. Hironaka: Yes.

Mr. Chun: I don't want to put words. What's the work...under 8599, what is the work that the consultant has to do?

Mr. Hironaka: This is for a Contested Case Hearings Officer for the Planning Commission.

Mr. Chun: Okay. So under this contract...this contract was subsequently assigned to Mr. Kimura, correct?

Mr. Hironaka: Yes.

Mr. Chun: And I will get into that later. Under this Contract 8599, who is the Officer-in-Charge of this contract?

Mr. Lord: Page 6.

Mr. Chun: If you look at page 6.

Mr. Hironaka: The County Attorney.

Mr. Chun: Okay. What does it mean when it says "the Officer-in-Charge"?

Mr. Hironaka: I would say pretty much manage the consultant on the scope and services for this contract.

Mr. Chun: Okay. So the County Attorney's Office or the County Attorney himself is the Officer-in-Charge? If you know. I mean, I'm just...

Mr. Hironaka: It just says County Attorney.

Mr. Chun: Okay. Now, this is for Contract 8599. Were you on the Selection Committee for 8599? If you recall.

Mr. Hironaka: I don't recall.

Mr. Chun: Okay. Yeah, if you don't recall. Were you on a Selection Committee for any of the contracts that Mr. Kimura currently has?

Mr. Hironaka: I don't recall.

Mr. Chun: Okay. I want to turn your attention to...its Exhibit G in front of you. I believe its Joint Exhibit D if you have both of them, but its Exhibit G, as in go.

Mr. Hironaka: This is the Selection Committee Master Scoring and Ranking Form?

Mr. Chun: Correct.

Mr. Hironaka: Yes.

Mr. Chun: And have you seen this document before?

Mr. Hironaka: Yes.

Mr. Chun: Is your name listed on this document?

Mr. Hironaka: Yes, it is.

Mr. Chun: And you're listed as a committee person No. 3, Myles Hironaka.

Mr. Hironaka: Correct.

Mr. Chun: And that's you, so you were involved in a selection process involving a Hearings Officer under Ordinance 904, Masters/Hearings Officer?

Mr. Hironaka: Correct.

Mr. Chun: Okay. Do you recall being on that committee?

Mr. Hironaka: Yes.

Mr. Chun: Okay.

Mr. Hironaka: Pursuant to this document.

Mr. Chun: (Laughter) Now you remember.

Mr. Hironaka: (Laughter) Yes.

Mr. Chun: Okay. As a member of that committee, what did you review?

Mr. Hironaka: This is really part of the professional services process where we review the resumes that have been submitted pursuant to the procurement process.

Mr. Chun: Okay.

Mr. Hironaka: For this procurement matter.

Mr. Chun: Okay. And also turning your attention to Exhibit H, which is another Review Committee Master Scoring and Ranking Form. Do you recall that form?

Mr. Hironaka: Yes.

Mr. Chun: And do you recall that you were also on the Committee—

Mr. Hironaka: Yes, I am.

Mr. Chun: When you say you review the resumes, what resumes did you review as part of that process?

Mr. Hironaka: Well, the normal process is they submit...the County puts out a request for professional services where interested people can submit their resumes, and so those are the resumes that we review; whatever they've submitted to us.

Mr. Chun: Okay. So all the resumes that were submitted to the County by applicants, the Committee that you were sitting on would review them?

Mr. Hironaka: Yes.

Mr. Chun: In your review as a person on that committee, did you review any resume of Harlan Kimura?

Mr. Hironaka: Not on this particular form, or this process. He's not listed here.

Mr. Chun: Okay. For the process in which you sat on, did you review an application or resume by Mr. Kimura?

Mr. Hironaka: No.

Mr. Chun: Okay. I noticed in Exhibit G and Exhibit H, Exhibit G was dated August 31, 2011. Was that about the time that your committee reviewed those resumes?

Mr. Hironaka: I believe so.

Mr. Chun: Okay.

Mr. Hironaka: Yeah.

Mr. Chun: And Exhibit H is—

Mr. Hironaka: This is...I'm sorry. This is like a summary, so I would assume it reflects the date that the meeting was held.

Mr. Chun: Okay. Somewhere around there?

Mr. Hironaka: Yeah.

Mr. Chun: Okay. I'm not holding you specifically to the date.

Mr. Hironaka: Okay.

Mr. Chun: So around the time period of August 31, 2011, there was no resume reviewed by your committee from Mr. Kimura?

Mr. Hironaka: That's correct.

Mr. Chun: Okay. And Exhibit H...around the time of October 6, 2011, was there any review of a resume by Mr. Kimura?

Mr. Hironaka: Yes, correct.

Mr. Chun: Okay. Looking at both Exhibits G and H, what resumes did you...your committee, not you but your committee, review?

Mr. Hironaka: On Exhibit G, it was Ayabe, Chong, Nishimoto, Sia and Nakamura.

Mr. Chun: Okay. And October, which is Exhibit H.

Mr. Hironaka: And Exhibit H is Ayabe, Chong, Nishimoto, Sia and Nakamura; and also, Mr. Glenn M. Kosaka.

Mr. Chun: Okay. And you testified that the normal procedure at that time would be to review all the resumes and applications submitted to the County at that time.

Mr. Hironaka: Correct.

Mr. Chun: Okay. Now, what are you reviewing these resumes for?

Mr. Hironaka: Well, let me try and answer that by referring to the exhibits—

Mr. Chun: Yes, you may.

Mr. Hironaka: —because these are two (2) different types of exhibits.

Mr. Chun: Right.

Mr. Hironaka: And they have different functions, so if I can—

Mr. Chun: Yes, you may. I was going to do it, but rather than put words in your mouth, I was just going to ask, “What did you review them for?”

Mr. Hironaka: Okay. So with Item H...excuse me, Exhibit H, this is a form that, I guess, summarized the process where the Committee reviewed the resumes and, I would say, this process is either to qualify or not to qualify the consultants for the process.

Mr. Chun: Okay.

Mr. Hironaka: Okay. The Exhibit G is really...so, let me back up.

Mr. Chun: Go ahead.

Mr. Hironaka: So the process is where you would have a Review Committee, which would review whether or not people that have submitted resumes to the County for this procurement process qualified for the services that we’re procuring. The Exhibit...the other process is you would have a Selection Committee where you now would look at the qualified consultants and to rank them based upon their resume.

Mr. Chun: Okay.

Mr. Hironaka: So Item G is now looking at the ranking of the consultants.

Mr. Chun: Okay. So the first one...and I’m not concerned about the time period. Exhibit H was the one initially just to see whether they qualify or not.

Mr. Hironaka: Correct.

Mr. Chun: And then Exhibit G is, then, to determine ranking for the two (2) applicants.

Mr. Hironaka: Correct.

Mr. Chun: Okay. Now...

Mr. Lord: Excuse me, Chair. May I ask a question?

Vice Chair Ho: Excuse me. Do you have a question?

Mr. Lord: I do.

Vice Chair Ho: We are in recess for a few minutes.

Mr. Chun: Sure.

Mr. Morimoto: Oh, no, no. He has a question for the parties.

Mr. Lord: I have a question for the parties.

Mr. Chun: Yeah.

Vice Chair Ho: Which party?

Mr. Lord: For Myles. Myles, in the process, are you interviewing individuals, firms, or both?

Mr. Hironaka: I can't recall in this process if we actually interviewed the consultants. Sometimes we may just look at the resumes themselves. And if we may have more questions, we may open it up to interviews between all of the consultants.

Mr. Lord: Because the list is primarily a list of firms.

Mr. Hironaka: Right.

Mr. Lord: So then the firm would say that we have the expertise.

Mr. Hironaka: What we're obligated to do is to receive the...which they are needing to provide that information in the resumes.

Mr. Lord: Okay, thank you.

Vice Chair Ho: You may proceed.

Mr. Chun: Okay. Thank you. So Myles, looking at Exhibit H, which is to determine whether they qualify or not, it looks like there's four (4) criteria that you're looking at. Would that be a correct assumption?

Mr. Hironaka: Actually, there's three (3). I'm sorry, wait. There is four (4), correct.

Mr. Chun: Four (4), okay. One of it is Staffing and Resources Capabilities.

Mr. Hironaka: Yes.

Mr. Chun: The other is Professional Licenses and Certifications.

Mr. Hironaka: Correct.

Mr. Chun: The other one is Age, Experience of Firm and Average No. of Employees.

Mr. Hironaka: Correct.

Mr. Chun: And the last one is Age, Experience of Firm and Average No.— Ha! (Laughter) It says the same thing, Myles. (Laughter)

Mr. Hironaka: So actually there's three (3).

Mr. Chun: There's probably three (3), right?

Mr. Hironaka: Yes.

Mr. Chun: Okay. I didn't write—

Mr. Hironaka: I was going to say that there's three (3).

Mr. Chun: Yeah. I didn't write that one, okay? Okay, so the three (3) criteria, and you found that all three (3) of...all two (2) of those firms were qualified based upon your criteria?

Mr. Hironaka: The Committee—

Mr. Chun: The Committee.

Mr. Hironaka: Yes.

Mr. Chun: Who else sat on the Committee?

Mr. Hironaka: The Planning Director Mike Dahilig and the County Attorney Alfred Castillo.

Mr. Chun: Okay. And looking at Exhibit G, you also...in order to rank them, there were three (3) criteria.

Mr. Hironaka: Correct.

Mr. Chun: Okay. And those three (3) criteria were the experience and professional qualifications.

Mr. Hironaka: Yes.

Mr. Chun: Next is past performance on similar projects.

Mr. Hironaka: Yes.

Mr. Chun: And the last one is the capacity to accomplish the work in the required time.

Mr. Hironaka: Yes.

Mr. Chun: And if I may, and I'm not going to go into detail on there, what went into those criteria? If you recall. For example, experience and professional qualifications. What criteria did the Committee use to determine whether...the numerical score they gave a company or applicant for that? If you recall.

Mr. Hironaka: I'm not sure if I understand the question, Jon.

Mr. Chun: In other words, what were the criteria used to determine the number that you gave to those applicants in Exhibit G for experience and professional qualifications?

Mr. Hironaka: Well, I think the...I don't know if I'll be answering your question, but basically, the procurement requirements require that we rank or provide a numerical value for each of the criteria in descending order.

Mr. Chun: Okay.

Mr. Hironaka: Starting from the most important which would carry the highest weight, to the second criteria which has the next highest weight, and then the third criteria which has the lowest weight.

Mr. Chun: Okay. So based upon at least the Committee's scoring, the highest rank was given to Ayabe, Chong, Nishimoto, Sia and Nakamura?

Mr. Hironaka: Yes.

Mr. Chun: And the No. 2, the name isn't there, but would it be correct to assume that the No. 2 person would've been Glenn Kosaka?

Mr. Hironaka: Yes.

Mr. Chun: Okay.

Mr. Hironaka: Well, I'm assuming this is the same procurement...yes, it is.

Mr. Trask: May I interject real fast?

Mr. Chun: Go ahead.

Mr. Trask: Just to clarify this. If you look at the stipulated exhibits, turn to C, and referencing C and D. Stipulated Exhibit D is the same as...as we've stated on the record, the same as what is being reviewed as G right now. And so if you look at C, it is the Professional Services Resume Form, and on those resume forms, and that is comprised of three (3) different pages, all dated August 31, 2011, stated by Dahilig, Al Castillo, and M. Hironaka, respectively, they all list Ayabe, Chong, Sia and Nakamura and then Glenn Kosaka, respectively.

Mr. Chun: Yeah.

Mr. Trask: And because that's the same date as what is D, I think Mr....we would stipulate that Mr. Chun is correct that it applies to the same thing. If I may approach the witness, I can clarify that.

Mr. Chun: Yeah. I mean, I don't have a problem. (Laughter) But go ahead. It looks like it was the handwritten score sheets; Exhibit C. Does the Commission have the Joint Exhibits, also? You do? Oh, okay.

Mr. Hironaka: Yes.

Mr. Chun: Okay. Yeah, I mean, Joint Exhibit...what, C?

Mr. Trask: I think it's--

Mr. Chun: Yeah.

Mr. Trask: Yeah.

Mr. Chun: Yeah. Joint Exhibit C, you reviewed what Mr. Trask gave to you?

Mr. Hironaka: Yes.

Mr. Chun: Okay. And those are basically the handwritten score sheets that the Committee used.

Mr. Hironaka: Correct.

Mr. Chun: The individual committee members.

Mr. Hironaka: Correct.

Mr. Chun: Okay. Basically, the summary of those is contained in Exhibit H. Would that be correct? Which is the qualification Scoring and Ranking Form.

Mr. Hironaka: Correct.

Mr. Chun: Yeah, okay. Now, eventually the contract was...let me backtrack. So would it be correct to say that the County received only two (2) applications for this particular contract?

Mr. Hironaka: Yes.

Mr. Chun: Okay.

Mr. Trask: Is that for Contract 8599?

Mr. Chun: Yeah.

Mr. Trask: And 8741?

Mr. Chun: No, just this one that they were talking about in Exhibit H and G, which is...it doesn't say specifically. It just says Ordinance No. 904 Masters/Hearings Officer. Maybe I can ask him that question. So Myles, for Exhibit G and H, on the Committee that you sat on for this one, what contract was this for? Was it 8599? Or was it for the other contract, which was...87 I think was.

Mr. Hironaka: I'm not sure actually.

Mr. Chun: Okay. Yeah, because the other contract was 8741, so do you know what...this contract that you sat on for, what Review Committee you sat on? Is that for 8599 or 8741? Or do you know?

Mr. Hironaka: Just given this information, I can't say that I know.

Mr. Chun: Okay. It's just that one of them you were on?

Mr. Hironaka: Correct.

Mr. Chun: Okay. In whatever contract that you were reviewing on... (Laughter) I'm not going to be specific. Do you know that contract was eventually assigned to Harlan Kimura? In whatever contract review that you were on; the Committee that you were on.

Mr. Hironaka: I guess I would say yes.

Mr. Chun: Okay. When the Contract Review Committee that you sat on...when that contract was assigned to Harlan Kimura, was the resume given to you?

Mr. Hironaka: Can I just make a correction to that?

Mr. Chun: Go ahead.

Mr. Hironaka: Just to say...I'm not sure if I sat in both Review and Selection Committees for both procurement of 8599 as well as the other one, so I just wanted to make that statement.

Mr. Chun: Okay. And I'll make the representation, Myles...and Mr. Trask can correct me if I'm wrong, but I don't believe you were sitting on both. If you turn your attention to Exhibit N, as in Nancy, which is stipulated into evidence as Exhibit 5 but it's labeled Exhibit N, as in Nancy. Do you see that document?

Mr. Hironaka: Yes.

Mr. Chun: That's for another contract. It doesn't say which one, but the Committee persons in that one according to this was Justin Kollar, Jody Sayegusa, and Andrea Suzuki.

Mr. Hironaka: That's what the document says, correct.

Mr. Chun: Right. You don't see your name on that one, do you?

Mr. Hironaka: No. No.

Mr. Chun: And also...and I'm going to follow through because I don't think...you weren't on it, but on that one, Exhibit N, they say they have seven (7) applications that they reviewed. Do you see Exhibit N?

Mr. Hironaka: Yes.

Mr. Chun: That one includes Ayabe, Chong; Sherry Broder; Goodstill Anderson Quinn; Glenn Kosaka; McCorriston Miller; O'Connor Playdon and Guben; and Jon Van Dyke. Do you see those listed?

Mr. Hironaka: Yes.

Mr. Chun: Do you recall seeing the resumes and/or applications by those people? Other than Ayabe, Chong, and Glenn Kosaka.

Mr. Hironaka: No.

Mr. Chun: Yeah. Okay, so I don't believe you were sitting on the other one.

Mr. Hironaka: Okay.

Mr. Chun: We just...at this point in time, I don't think there's any information as to which ones correspond to which contract. So I want to just ask the general question and so Mr. Hironaka, in regards to the Contract Review Committee that you sat on, did you receive, at any time, a resume or application by Harlan Kimura?

Mr. Hironaka: No.

Mr. Chun: Did you, as a member of the Committee, ever do an evaluation of Mr. Kimura?

Mr. Hironaka: No.

Mr. Chun: Were you asked by anybody to do a review of Mr. Kimura and his qualifications?

Mr. Hironaka: Pursuant to that exhibit? No.

Mr. Chun: Yeah. Or, for example, did you, as a member of the Committee, ever evaluate the...whether or not the staffing and resource capabilities, professional licenses and certifications, and age and experience of firm and average number of employees, as set forth in Exhibit H, did you determine, at any time as a committee member, whether Mr. Kimura was qualified? Under those criteria.

Mr. Hironaka: Not pursuant to this document. He's not on this list.

Mr. Chun: Okay.

Mr. Hironaka: Yeah.

Mr. Chun: I know he's not on the list, but were you ever asked to determine his qualifications to bid?

Mr. Hironaka: No.

Mr. Chun: Okay. Now, following through on Exhibit G, were you ever asked as a member of the Committee to evaluate and score his rank regarding the experience and professional qualifications, past performance on similar projects, and capacity to accomplish the work in the required time of Mr. Kimura?

Mr. Hironaka: No.

Mr. Chun: Okay. Would it be correct to say that as a member of the Committee, you don't have any idea as to the qualifications of Mr. Kimura?

Mr. Hironaka: Again, not pursuant to this document.

Mr. Chun: Okay. Or as your role as a committee member?

Mr. Hironaka: Correct. Correct.

Mr. Chun: Do you know of any committee that did review the qualifications of Mr. Kimura?

Mr. Hironaka: I can't say that I know that.

Mr. Chun: As a Planner with the Planning Department, and you're basically part of the duties involved with the administration of the contract, is there anything in the Planning Department's

records to show that there was an evaluation of the qualifications of Mr. Kimura in the Planning Department records that you reviewed?

Mr. Hironaka: I'm not sure if there is.

Mr. Chun: Okay.

Vice Chair Ho: Attorneys, we have a question from (Commissioner) Streufert.

Mr. Chun: Sure. Go ahead.

Ms. Nogami Streufert: Let's see. C.

Mr. Chun: C.

Ms. Nogami Streufert: Exhibit C. It's the Resume No. 1-Professional 11/12; F1, Ordinance No. 904.

Mr. Trask: For the record, I don't think the witness has a copy of the stipulated exhibits. Could he be provided one? We provided the Commission previously. Does the Clerk have any?

Mr. Chun: The first one. On top of it, it says "Planning Department Exhibit List for December 13, 2016". Can we take a short recess, Mr. Chair?

Vice Chair Ho: Yes.

Mr. Chun: Thank you.

Vice Chair Ho: We'll take a short recess here.

Mr. Chun: Thank you.

The Commission recessed this portion of the meeting at 11:12 a.m.

The Commission reconvened this portion of the meeting at 11:17 a.m.

Vice Chair Ho: We are in session again. Mr. Chun.

Mr. Chun: Yes, Commissioner Streufert was asking a question.

Ms. Nogami Streufert: On the original that we got, which is Exhibit C...and I'm not sure which contract this is with, don't know whether you were on it or not so I can't really say, but I'm looking at the format that you have here and it seems to be very similar to the format that you have on the other ones. And it says here that when you're evaluating it, you're evaluating the professional licenses and certifications and experience of principles and staff, so it's the entire firm that you're looking at. Is that not correct? As well as the age, experience of firm, and

average number of employees, and the involvement in similar types. Is that not just on any individual type? Or is that on the firm that you've got there?

Mr. Hironaka: It is on the firm pursuant to the resume that they've submitted to us, correct.

Ms. Nogami Streufert: Okay. Thank you.

Vice Chair Ho: Mr. Chun.

Mr. Chun: Oh, okay. Can I turn your attention to Exhibit O, which is the...it says the list of exhibits. Yeah, that one. That one. Which was...I guess that's been stipulated. Do you have that Mr. Hironaka?

Mr. Hironaka: I'm not sure what this is, but it's...doesn't have...I can't see the title. Oh, Contract Check Slip?

Mr. Chun: Yeah.

Mr. Hironaka: Okay.

Mr. Chun: Yeah, so do you recognize that document? Have you seen a document like that?

Mr. Hironaka: No, I have not.

Mr. Chun: Okay. It says on the top, "AGENCY POC: M. Hironaka". That would be yourself?

Mr. Hironaka: Yes, correct.

Mr. Chun: Okay. And this is for Contract 8741?

Mr. Hironaka: Yes.

Mr. Chun: And under this document, does it indicate the amount that has been paid under the change orders as of the date of that document?

Mr. Hironaka: Yes.

Mr. Chun: And what is that amount?

Mr. Hironaka: I think this is an encumbrance if I'm not mistaken.

Mr. Chun: I don't know. It's a document from the County's files.

Mr. Hironaka: Well, it says \$91,779.

Mr. Chun: Okay. And that's up to Change Order 1?

Mr. Hironaka: Correct.

Mr. Chun: Up to whatever that date is, correct?

Mr. Hironaka: May 22, 2013.

Mr. Chun: And the original contract...what was the original contract for?

Mr. Hironaka: \$50,000.

Mr. Chun: Okay. So the original contract started at \$50,000 and then as of Amendment 1, it went up to \$91,779. Would that be correct?

Mr. Hironaka: Correct.

Mr. Chun: And that happened when the contractor was Harlan Kimura at that time.

Mr. Hironaka: I'm assuming so. It says that on the document.

Mr. Chun: Okay. Was the increase for...do you know how the increase for that contract was handled? Was it all internally within the Planning Department's budget?

Mr. Hironaka: I would say it's from our General Fund budget.

Mr. Chun: Okay. Was there any increase...did the Planning Department need to submit a supplemental budget request to the Council to obtain the additional funds to—

Mr. Hironaka: I'm trying to think back.

Mr. Chun: Yeah.

Mr. Hironaka: I think all along the...each year we've requested and, I think, received the funding for a Hearings Officer.

Mr. Chun: Okay.

Mr. Hironaka: Through our General Fund budget.

Mr. Chun: Okay. How many cases have Mr. Kimura been appointed as a Hearings Officer by the Planning Commission? Approximately. I don't need to have an—

Mr. Hironaka: I would say at least a dozen.

Mr. Chun: At least a dozen?

Mr. Hironaka: Yes.

Mr. Chun: Of those cases, how many have been completed by Mr. Kimura?

Mr. Hironaka: Only a few. I think one or two.

Mr. Chun: Okay.

Mr. Hironaka: That I can—

Mr. Chun: Approximately.

Mr. Hironaka: Yeah.

Mr. Chun: I'm not going to tie you down that that's that number. So about a dozen cases Mr. Kimura has been the appointed Hearings Officer, correct?

Mr. Hironaka: Yes.

Mr. Chun: Approximately.

Mr. Hironaka: Yeah.

Mr. Chun: And of those, approximately...what? Two or three, or one or two has been completed?

Mr. Hironaka: I would say that's an estimate, yeah.

Mr. Chun: Estimate. Of those three, how many times has Mr. Kimura ruled against the County of Kaua'i?

Mr. Trask: Objection, vague and ambiguous as to ruled.

Mr. Chun: In his final decision, how many final decisions that Mr. Kimura has rendered that was against the County of Kaua'i?

Mr. Trask: Objection, vague and ambiguous and argumentative as to final decision. The Planning Commission makes the final decision. He merely makes recommendations.

Mr. Chun: Let me rephrase the question; that was a good point. How many of those decisions that Mr. Kimura has recommended to the Planning Commission was a recommendation against the Planning Department?

Mr. Hironaka: I don't think he made any recommendation against the Department.

Mr. Chun: Okay. Are you familiar with an account called "251" within the Planning Department?

Mr. Hironaka: I believe that's the Enforcement account.

Mr. Chun: Okay. And that account was set up by a County ordinance?

Mr. Hironaka: Yes.

Mr. Chun: Okay. And can you describe to the Commission what the Enforcement account is?

Mr. Hironaka: Just in summary, Commission, the 251 is an enforcement account established by ordinance which allows the Planning Department to levy fines on, I guess you would say, those that do not conform or comply with the Zoning Codes. So the 251 is a revolving fund which the fines that are levied are placed into that for use by the Planning Department for enforcement purposes.

Mr. Chun: When you say "revolving fund"...I mean, because some people might not be familiar with that term. What do you mean by "revolving fund"?

Mr. Hironaka: It's a fund which is held in and by itself up to about...I think there's a ceiling of \$100,000.

Mr. Chun: Okay. So how is that fund...what monies are placed into that fund?

Mr. Hironaka: Those are civil fines.

Mr. Chun: Okay. And who pays the money out of that fund? In other words, who writes the check?

Mr. Hironaka: Who writes the—

Mr. Chun: Yeah.

Mr. Hironaka: I don't understand the question.

Mr. Chun: Okay. How is the money paid from that fund, that revolving fund? How is it paid out?

Mr. Hironaka: Oh, you mean how it's used.

Mr. Chun: How's it used, yeah. Okay.

Mr. Hironaka: Sorry.

Mr. Chun: How is it used? And who authorizes that use?

Mr. Hironaka: Again, I don't have the ordinance before me, so I don't want to say something which doesn't conform to the ordinance. But basically, the ordinance has specific...I'm not sure what the word would be. It can be used for certain things.

Mr. Chun: Okay.

Mr. Hironaka: For example, like, office supplies, which then you would have to go through normal procurement process for office supplies and equipment and so forth.

Mr. Chun: Okay. And does the Planning Department have the authority to sign off on the use of the funds within that revolving fund?

Mr. Hironaka: Yes.

Mr. Chun: Okay. Does any other department have to sign off on the use of those funds?

Mr. Hironaka: I don't think so.

Mr. Chun: Okay. So just the Planning...it's within the Planning Department only?

Mr. Hironaka: Yes.

Mr. Chun: Okay. Does the Planning Department have any rules or regulations, or written policies regarding what can or can't be paid out from that fund, other than what is in the ordinance?

Mr. Hironaka: Again, I would just say we're required to follow what's in the ordinance.

Mr. Chun: Okay. But do you know of any other internal policies or procedures that the Department—

Mr. Hironaka: I don't know.

Mr. Chun: Would you be aware of any of those policies or procedures as the Administrative Officer?

Mr. Hironaka: Not for this fund.

Mr. Chun: Okay. Who would be aware of those?

Mr. Hironaka: I guess that would be the Manager of the Enforcement Division.

Mr. Chun: And who would that be?

Mr. Hironaka: Mike Laureta.

Mr. Chun: Okay. So other than the Manager of the Enforcement Division and maybe even the Planning Director, who would be in charge with taking money from that fund?

Mr. Hironaka: From like a ministerial thing or...I'm not sure what--

Mr. Chun: Yeah, from a ministerial...yeah, ministerial thing. Who would be...needs to sign off?

Mr. Hironaka: I would--

Mr. Chun: Oh, you would.

Mr. Hironaka: Either Mike or I would sign off.

Mr. Chun: Okay. Mike Laureta you mean?

Mr. Hironaka: Right.

Mr. Chun: Okay because there's two (2) Mike's.

Mr. Hironaka: Right.

Mr. Chun: Okay. And as one of the persons signing off, you are not aware of any policies or procedures within the terms of what you need to review prior to signing off? Other than the ordinance.

Mr. Hironaka: The ordinance.

Mr. Chun: Okay. But you're not aware of any written procedures within the Planning Department?

Mr. Hironaka: I'm not aware.

Mr. Chun: Okay. Just one last question, or maybe two. I asked you on Exhibit J, which is Contract No. 8599, but I want to ask you a question regarding Exhibit Q, Contract 8741. Do you have that in front of you? And for the Commission's edification, Exhibit Q is the Joint Exhibit N, as in Nancy.

Mr. Hironaka: Yes.

Mr. Chun: Okay. And this is the other contract regarding...that Mr. Kimura now has, correct?

Mr. Hironaka: Yes.

Mr. Chun: Okay. And similarly, this contract, the Officer-in-Charge is the County Attorney as indicated on page 6?

Mr. Hironaka: Yes.

Mr. Chun: Okay. And this is the second contract you administered as the Planning Department Planner VI? VIII? Planner VIII. What Planner are you?

Mr. Hironaka: VII.

Mr. Chun: VII. Oh sorry. I promoted you.

Mr. Hironaka: Thank you.

Mr. Chun: (Laughter) so this is the other contract that you administered as the Planner VII?

Mr. Hironaka: Yes.

Mr. Chun: Okay. Are there any other contracts that Mr. Kimura has with the County Planning Department, other than the two (2) that we already talked about today?

Mr. Hironaka: Not that I know of.

Mr. Chun: Okay. Does the Planning Department keep a file on Mr. Kimura? Or is there a file regarding Mr. Kimura's work in the Planning Department?

Mr. Hironaka: Only...I guess only from the contract payment side.

Mr. Chun: Okay. And you've seen those files?

Mr. Hironaka: Yes.

Mr. Chun: And in those files, is there a resume of Mr. Kimura?

Mr. Hironaka: I can't say if there is.

Mr. Chun: Okay. In those files, are there any evaluations by any County personnel regarding the qualifications of Mr. Kimura?

Mr. Hironaka: I can't say if I've seen any of that.

Mr. Chun: Okay. In any of those files, is there any indication as to how Mr. Kimura was selected to be assigned this contract?

Mr. Hironaka: I don't know that.

Mr. Chun: Okay. As a member of the committee that was on one of the Evaluation Committees, do you know how the name of Mr. Kimura came up?

Mr. Hironaka: Again, this was...as far as the Assignment?

Mr. Chun: Yeah, as far as the Assignment. Sorry.

Mr. Hironaka: Again, this was a matter that was handled through the County Attorney's Office. At that time, I believe it was Deputy County Attorney Ian Jung.

Mr. Chun: Okay.

Mr. Hironaka: And I think all those matters were handled by him.

Mr. Chun: By the Officer-in-Charge?

Mr. Hironaka: Yes.

Mr. Chun: Okay. And to your knowledge, the Planning Department was not involved?

Mr. Hironaka: No.

Mr. Chun: In any of those folders or files that the Planning Department has, is there an indication of any other kind of involvement Mr. Kimura has with...or a potential involvement Mr. Kimura has with any of the parties to any of the cases he's been referred to? In other words, is there any kind of indication whether there has been a conflict review? Whether Mr. Kimura might have a conflict.

Mr. Hironaka: I don't know.

Mr. Chun: Okay. You haven't seen anything?

Mr. Hironaka: No.

Mr. Chun: Okay. I have no further questions, Mr. Chair.

Vice Chair Ho: Thank you.

Mr. Chun: I don't...

Mr. Edwards: I have questions.

Mr. Trask: I think it's probably best if all petitioners went first and then we would follow.

Vice Chair Ho: Mr. Chun, you have a colleague that wants to be recognized here, I believe.

Mr. Chun: Another party was going to be asking questions. But yes, I believe...

Mr. Edwards: Mr. Chair, I'm Barry Edwards. I represent – with (inaudible) Bickerton – three (3) of the parties here today; Alexis Boilini and Michael Levy, Bill and Cathy Cower, and Eddi and Steve Henry who are not present. I just have a few questions of Mr. Hironaka.

Who pays Mr. Kimura when he submits a bill?

Mr. Hironaka: The Planning Department. We pay that.

Mr. Edwards: Those funds come out of the General Fund?

Mr. Hironaka: It comes out of the contract itself which came from the General Fund.

Mr. Edwards: Okay. So the funds for the contract are from the General Fund, correct?

Mr. Hironaka: Yes.

Mr. Edwards: What does it mean in your prior testimony that the Enforcement account has a \$100,000 limit?

Mr. Hironaka: That's pursuant to the ordinance itself. If the fines that are levied and the fund balance accumulates beyond \$100,000, whatever is beyond that is to be then turned back over into the General Fund.

Mr. Edwards: So if more than \$100,000 is collected, the excess goes to the General Fund at some periodic time?

Mr. Hironaka: Correct.

Mr. Edwards: In 2014, that amount was about \$46,000, wasn't it? I'm not asking you to have that kind of memory. (Laughter in background) But it was a substantial chunk of change.

Mr. Hironaka: I believe there was some funds—

Mr. Trask: Objection, argumentative as to substantial.

Mr. Edwards: I'm sorry, I didn't hear your answer.

Vice Chair Ho: Could you wait? Could you... Objection?

Mr. Trask: Oh, just argumentative as to substantial. I believe he said \$46,000. That would be less than half of \$100,000, but that's all.

Mr. Hironaka: Well, I believe some funds were returned to the General Fund.

Mr. Edwards: Okay. So—

Mr. Hironaka: I don't know the exact amount.

Mr. Edwards: If I'm following the money, the money goes from the Enforcement account, above \$100,000, into the General Fund, and gets comingled with everything else that's in the General Fund. Is that true?

Mr. Hironaka: I don't know.

Mr. Edwards: Okay. But the money that left the Enforcement account went to the General Fund; that you do know.

Mr. Hironaka: Yes.

Mr. Edwards: That's all I have at this time. Thank you, Mr. Chair.

Mr. Kugle: Mr. Chair, Greg Kugle for two (2) of the parties; Bardin and Allen. I will just join in and rest with the questions that were already asked by my colleagues. Thank you.

Vice Chair Ho: Mauna Kea.

Mr. Trask: For the record, Mauna Kea Trask, County Attorney. I just have a couple questions. I, myself, represent the Department in the Guyer case singularly.

Mr. Hironaka, I'm going to refer you to...let's see. I'm going to try to go off, as much as I can, the Joint Stipulated; so this is the green one. Yeah. So I want you to...to refer you to Joint Exhibits G and N, respectively. And so for the record, G being Contract 8599 and N being Contract 8741. Okay?

Mr. Hironaka: Yes, got it.

Mr. Trask: So as far as G, Contract 8599, in the first page under the...under where it says "WITNESSETH", that paragraph says, "WHEREAS, the County desires to engage the Consultant to serve as master to hold hearings and take testimony..." Do you see that?

Mr. Hironaka: Yes.

Mr. Trask: Okay. And it says, "...upon the matters involving transient vacation rental (TVR) related appeals, report to the Planning Commission its findings..." etc. Do you see that?

Mr. Hironaka: Yes.

Mr. Trask: Okay. Now, if you look at Exhibit N, that's Contract 8741. Again, first page under "WITNESSETH", it states, "WHEREAS, the County desires to engage the Consultant to serve as master to hold hearings and take testimony upon the matters involving contested case hearings and proceedings..." Do you see that?

Mr. Hironaka: Yes.

Mr. Trask: Okay. So now, I want to tell you...ask you to refer to Stipulated Exhibit A, and that's the Notice for Professional Services, 1-PROF-11/12. Do you see that?

Mr. Hironaka: Yes.

Mr. Trask: Okay. Now, turn to the second page, and under section and subsection B.1. Do you see that? Okay, and that's B. County Boards and Commissions, 1. Master/Hearings Officer.

Mr. Hironaka: Yes, I see that.

Mr. Trask: Okay. So that's B.1. Now I want you to turn to page...kind of in the middle I guess. Go to Section, though, F.1.

Mr. Hironaka: F...

Mr. Trask: Just flip through until you hit F.1., Frank.

Mr. Hironaka: Exhibit F?

Mr. Trask: No, no. Within A, in that document...you know, it's broken up into A, B, C, D...

Mr. Hironaka: Oh, oh, I see.

Mr. Trask: Yeah, so just go to F.1.

Mr. Hironaka: Yes.

Mr. Trask: Okay. So F.1., that is the Ordinance 904, County of Kaua'i, and it's under the Planning Department; F. Department of Planning, 1. Ordinance 904, correct?

Mr. Hironaka: Correct.

Mr. Trask: Okay. So now, I'm going to refer you to the blue; just so you can have this on the same...or side by side. Turn to Exhibit G; that is Petitioner's Exhibit G. And that is the ranking sheet, correct? That you sat on.

Mr. Hironaka: Correct.

Mr. Trask: Okay. And at the top left, it says "Professional Service #". Do you see that?

Mr. Hironaka: Yes.

Mr. Trask: Okay. So that's F.1. Correct? If it goes 1-PROF-11/12, F.1.

Mr. Hironaka: Correct.

Mr. Trask: Okay, so does that then mean on August 31, 2011, you sat on a Selection Committee Master Scoring and Ranking Form regarding the services as described in Exhibit A, Subsection F.1. for the Ordinance 904, Department of Planning Hearings Officer?

Mr. Hironaka: Yes.

Mr. Trask: Okay. So now, I'm going to ask you again to turn to Joint Exhibit G; that's Contract 8599. And that...again, to that WITNESSETH first paragraph. When it states then that this is to serve as a master to hold hearing and take testimony upon the matters involving transient vacation rental (TVR) related appeals, is that 904? Ordinance 904? This is the first page.

Mr. Hironaka: Yeah, I know.

Mr. Trask: Okay, sorry.

Mr. Hironaka: Yes.

Mr. Trask: That is?

Mr. Hironaka: Yes.

Mr. Trask: Okay, so Contract 8599 pertains to the Professional Services for F.1., Planning Department.

Mr. Hironaka: Yes.

Mr. Trask: Okay. So now, I'm going to ask you to turn to—

Mr. Hironaka: Well, can I point something out?

Mr. Trask: Go ahead.

Mr. Hironaka: If I were to turn to the last page of Contract 8599—

Mr. Trask: Correct.

Mr. Hironaka: You will see the funding certification which lists \$300,000.

Mr. Trask: Yeah.

Mr. Hironaka: And that matches with the publication for professional service where we had \$300,000.

Mr. Trask: And that's for the F.1.?

Mr. Hironaka: F.1., correct.

Mr. Trask: Okay. Now I want you...thank you very much. That helps. And this is for clarification because there was some ambiguity as to what you sat on which contract. So 8599 is what you sat on, on August 31, 2011.

Mr. Hironaka: Correct.

Mr. Trask: Okay. So now I want you to turn to N, Joint N, and for the record, that's Contract 8741.

Mr. Hironaka: Okay.

Mr. Trask: Okay. And so when that says a master to hold hearings and take testimony, I now want you to turn to Petitioner's N, as in Nancy; that's the blue. Go to the blue N, and this is the ranking form which you did not sit on. And on the top left hand corner you can see it says Professional Services # 1-PROF-11/12, B.1. Do you see that?

Mr. Hironaka: Yes.

Mr. Trask: Okay. So now, again, turn to Stipulated A, and that second page. B.1. would correspond to the County Boards and Commissions Master/Hearings Officers.

Mr. Hironaka: Correct.

Mr. Trask: And so, again, in the same stipulated, turn to N. Yeah, that Contract 8741 is the Boards and Commissions Master/Hearings Officer, whereas 8599 would be the Planning Commission 904 Hearings Officer. Correct?

Mr. Hironaka: I believe so, yes.

Mr. Trask: And that's because...well, let me ask you. Does the Planning Commission hold appeals and require the services of a Hearings Officer, including and beyond that, strictly related to 904? If you don't understand the question, let me...I can re-ask it again.

Mr. Hironaka: Yeah.

Mr. Trask: Okay, so the Planning Commission hears appeals regarding TVR Ordinance 904, correct?

Mr. Hironaka: Yes.

Mr. Trask: And those...is it appropriate that those hearings would be held subject to the person selected for that F.1. solicitation? Because that's 904 hearings.

Mr. Hironaka: Yes, it was intended that way.

Mr. Trask: Yeah.

Mr. Hironaka: Correct.

Mr. Trask: But they also hear...or does the Planning Commission also hear appeals not involving specifically 904?

Mr. Hironaka: Yes.

Mr. Trask: So like SMA Permits, maybe. Correct?

Mr. Hironaka: I know they've looked at a matter dealing with additional dwelling units.

Mr. Trask: Yeah, ADUs?

Mr. Hironaka: Yes.

Mr. Trask: And so therefore, you would contract, then, for general Hearings Officer services not specifically for 904. Would that be correct?

Mr. Hironaka: That would be the intent, correct.

Mr. Trask: Thank you for clearing that up. Again, I'm going to have you look at...okay, the Officer-in-Charge. At this time, I'd request the Commission to take judicial notice, which is allowable under the Rules of Practice of Planning...the rules of the Planning Commission. Under Charter Section 19.818(a), before execution, all written contracts to which the County is a party shall be approved by the County Attorney as to form legality.

Mr. Chun: No objection.

Mr. Trask: Okay. I'm going to refer you to Stipulated Exhibit G, and turn to the...let's see. This is the...page 9, so the third to last page. As far as...do you see that part where it says "APPROVED AS TO FORM AND LEGALITY"?

Mr. Hironaka: Yes.

Mr. Trask: Do you recognize that signature?

Mr. Hironaka: I'm sorry, I can't make out the name.

Mr. Trask: Okay.

Mr. Hironaka: But...yeah, I can't make out that name.

Mr. Trask: Okay. Do you see Jodi Sayegusa's signature a lot? If you don't know, you don't know.

Mr. Hironaka: I don't know.

Mr. Trask: But do you see that...

Mr. Hironaka: It's a deputy county attorney.

Mr. Trask: Deputy county attorney.

Mr. Hironaka: Right. Correct.

Mr. Trask: And at this time, at the next page, turn to the next page. The jurats were executed on or about 2011. Do you see that?

Mr. Hironaka: Yes.

Mr. Trask: Okay. At that time, who was the County Attorney for the County of Kaua'i in 2011? If you recall.

Mr. Hironaka: I think it was Al Castillo.

Mr. Trask: And at the same time—

Mr. Hironaka: Oh, Alfred. Excuse me.

Mr. Trask: Alfred. And he was on those review and selection committees.

Mr. Hironaka: Correct.

Mr. Trask: Turn to Exhibit N. And again, I'm going to ask you to turn to page 9 again. Do you recognize the Deputy County Attorney's signature at page 9?

Mr. Hironaka: I think that looks like Ian Jung's signature.

Mr. Trask: Okay.

Mr. Hironaka: But I'm guessing.

Mr. Trask: And at page 10, the jurats are executed during on or about 2012.

Mr. Hironaka: Correct.

Mr. Trask: Do you recall who your deputy county attorney was?

Mr. Hironaka: It was Ian Jung.

Mr. Trask: It was Ian Jung?

Mr. Hironaka: Yes.

Mr. Trask: So as far as...for your duties and responsibilities in these contracts, you said it was logistical regarding payment, etc., correct?

Mr. Hironaka: Correct.

Mr. Trask: And if you had any questions regarding that, who would you talk to? Would you talk to...as far as legally?

Mr. Hironaka: The deputy county attorney.

Mr. Trask: Okay. And that would be Ian Jung or Jodi Sayegusa?

Mr. Hironaka: Correct.

Mr. Trask: You testified today, to the best of your recollection, you did not review – at least in 2011 when you were a part of it – any resumes relating to Harlan Kimura, correct?

Mr. Hironaka: That's correct.

Mr. Trask: Have you done professional selections services before as part of your duties and obligations?

Mr. Hironaka: Before what's on the exhibits?

Mr. Trask: I mean like...yeah, generally.

Mr. Hironaka: Yes.

Mr. Trask: And to your knowledge, are those proceedings governed by any law?

Mr. Hironaka: I'm not sure what the exact statute is, but its procurement laws.

Mr. Trask: Okay. Going to...I just request the Commission to take judicial notice that pursuant to 103D-304, governs the procurement of professional services.

Mr. Chun: No objection.

Mr. Trask: Does that sound right to you?

Mr. Hironaka: Yes.

Mr. Trask: And although it's a State law, isn't it correct that the counties have to follow the Procurement Code?

Mr. Hironaka: Yes.

Mr. Trask: So when you were reviewing...although you didn't review Harlan's resume during the selection process, did you review any application submitted by Mr. Chun independently?

Mr. Chun: Mr. Chun?

Mr. Trask: Yeah, Jonathan Chun.

Mr. Chun: Oh.

Mr. Hironaka: Did I review?

Mr. Trask: Yeah, did Jonathan Chun submit any professional services resumes to be selected as a Hearings Officer either for...you know, for County legal work?

Mr. Hironaka: I don't recall. I don't think so, yeah.

Mr. Trask: Have you ever seen the firm of Belles Graham Proudfoot Wilson & Chun submit professional services resumes to do legal work for the...or Hearings Officer work for the Planning Department?

Mr. Hironaka: Not for...I haven't seen for the Planning Department.

Mr. Trask: Okay. Have you seen them submit for any (inaudible)?

Mr. Hironaka: I would say no.

Mr. Trask: Do you recall ever seeing resumes or review resumes for either...any of the other Petitioners' attorneys; be it Mr. Bickerton, Mr. Edwards, or Mr. Kugle?

Mr. Hironaka: I can't say that I've seen any. Not for the Planning Department.

Mr. Trask: Okay. So in this case, you don't recall any of the counsel...or even the parties. How about any of these people; the parties who are subject to these contested cases. For instance, did Kirby Guyer or Milton Searles submit requests, or any of the other parties, to do Hearings Officer work for the County of Kaua'i in these respective...and for the record, that's John and Lorna Hoff, Lloyd Fischer, Shirley Fischer, Todd Schirm, Brysone Nishimoto, Catherine Nishimoto, Michael Chandler, John and Shannon Wark, Parnell and Michele Kaiser, Tony Sutherland and/or Alta Management Services, Thomas and Jennifer Brooks, Michael Levy or Alexis Boilini, Anthony Bardin, Steve and Eddi Henry, William and Catherine Cowern, or Greg Allen Sr. and Jr., respectively?

Mr. Hironaka: I have not seen any.

Mr. Trask: Okay, so I'm going to refer you, again, to Joint Exhibit G and go to the last page of Joint Exhibit G, and that's the original certification. I'm going to refer you to that "001-" number. Do you see that?

Mr. Hironaka: Yes.

Mr. Trask: Is that an account number?

Mr. Hironaka: Yes.

Mr. Trask: Okay. And the title of that account is "Other Services", right?

Mr. Hironaka: Correct.

Mr. Trask: Okay. When you review the payment to Mr. Kimura, how does that come in to you? Is it...what form is that in?

Mr. Hironaka: It's like a...invoice billings to us, yeah.

Mr. Trask: And how does he invoice? Does he bill...

Mr. Hironaka: I think he does it monthly.

Mr. Trask: Okay. So you get like a monthly invoice?

Mr. Hironaka: Yes.

Mr. Trask: And I want you to turn to page 3 of that exhibit, Exhibit G, and specifically Page 3, Section 4.A.; that's Compensation. Do you see that?

Mr. Hironaka: Yes.

Mr. Trask: And that states the consultant shall be compensated at a rate of no more than \$175 per hour, correct?

Mr. Hironaka: Correct.

Mr. Trask: So you get, what, like a monthly invoice for hourly billings?

Mr. Hironaka: Yes.

Mr. Trask: Does Mr. Kimura bill per result? Like based upon his Findings of Fact or Conclusions of Law or recommendations. Or does he bill hourly?

Mr. Hironaka: I would say I believe he bills hourly per case.

Mr. Trask: Okay. Do you give him a bonus because he finds for the Department?

Mr. Hironaka: No.

Mr. Trask: Okay. Do you penalize him if he finds against the Department?

Mr. Hironaka: No.

Mr. Trask: So you mean to say that he gets paid regardless of his recommendation?

Mr. Chun: Objection, leading. Also, he already testified that he only knows that Mr. Kimura has only held in favor of the County, so how can he be penalized for not because he's never held against the County?

Mr. Trask: I would just say that in regards to the—

Mr. Chun: And if that...I mean, I'll just say at this point it's argumentative because he already testified he's never ruled against the County.

Mr. Trask: I'll argue it.

Mr. Chun: Yeah, I mean, I'm...you can argue it.

Mr. Trask: But...and as far as the evidence, evidence is lax. I just want to proceed this along and also, too, I know Mr. Hironaka is a Planning Department employee, but he was called by...direct by the Petitioner, so I just (inaudible).

Vice Chair Ho: I'll let Mauna Kea's question stand. You may—

Mr. Trask: Thank you. I'm almost done. Just to...as well, turn to Exhibit N; that Stipulated Exhibit N. And again, Page 3, Section 4.A. Similarly, under Contract 8741, Consultant is still paid not more than \$175 per hour, correct?

Mr. Hironaka: Correct.

Mr. Trask: I'm going to ask you to turn to...I'm going to have you simultaneously refer to Exhibits N, Page 7 and Exhibit G, again Page 7.

Mr. Hironaka: N, Page 7. And what was the...?

Mr. Trask: G, 7.

Mr. Hironaka: G.

Mr. Trask: And both...I'll give you some time. I'm sorry. So both Section 10, respectively. Mr. Hironaka, is it fair to say that these contracts are substantially similar?

Mr. Hironaka: Sort of, yeah. Yeah.

Mr. Trask: So 10, what's the title of Section 10?

Mr. Hironaka: Assignment; on both documents.

Mr. Trask: Okay. And can you read what that...it's just a sentence. Read what that sentence—

Mr. Hironaka: Consultant shall not assign any interest in this contract, and shall not transfer any interest in the same, whether by assignment or novation, without the prior written consent of the County.

Mr. Trask: Okay. And that you were reading off Exhibit...?

Mr. Hironaka: I'm sorry. Exhibit—

Mr. Trask: G, right?

Mr. Hironaka: G.

Mr. Trask: Okay. And I want you to turn to N and review Section 10. Is it the same?

Mr. Hironaka: It's the same.

Mr. Trask: So...one moment. I'm going to have you turn to Exhibits I and P, respectively.

Mr. Hironaka: Of the Joint —

Mr. Trask: Yeah, Joint. Joint Exhibit I, Joint Exhibit P. And for the record, they are the Assignment of Contract 8599 and the Assignment of Contract 8741, respectively.

Mr. Hironaka: Okay.

Mr. Trask: Okay. And what are these documents?

Mr. Hironaka: They are the Assignment of the two (2) contracts — 8599 and 8741 — from Mr. Nakamura over to Mr. Kimura.

Mr. Trask: Okay. I want you to look at about the middle of the page beginning with the third "WHEREAS". It states, "Section 10 of the Contract entitled "Assignments", allows for an assignment to be made of the Contract with prior written consent of the County". Correct?

Mr. Hironaka: Yes.

Mr. Trask: And then it refers to a Hawai'i Administrative Rule 3-11-125-14(2), correct?

Mr. Hironaka: Yes.

Mr. Trask: Okay. In both of these Assignments, I want you to turn to page 3 on both of the Assignment Agreements. They were both executed on April 21, 2015, correct?

Mr. Hironaka: Yes.

Mr. Trask: And both signed by Deputy County Attorney Ian Jung and the respective parties, correct?

Mr. Hironaka: Correct.

Mr. Trask: Okay. And earlier you testified Ian Jung handled the Assignment of these contracts, correct?

Mr. Hironaka: That is my understanding.

Mr. Trask: When you testified earlier, you said they were handled by the OIC, correct?

Mr. Hironaka: Yes. Officer-in-Charge, correct.

Mr. Trask: So to your understanding, Ian Jung was the Officer-in-Charge as far as these contracts went.

Mr. Hironaka: That's my understanding.

Mr. Trask: That's fine. Okay, finally...couple more questions. So to your knowledge, has the Enforcement account exceeded \$100,000 in the past?

Mr. Hironaka: I believe it did. I can't recall exactly when.

Mr. Trask: Okay. Was it recently?

Mr. Hironaka: Well, the ordinance itself is fairly recent. It's after these...well, it's after the execution of the initial contracts.

Mr. Trask: Okay. But to your knowledge, it has gone over \$100,000?

Mr. Hironaka: I believe it did.

Mr. Trask: And so when it goes into General Fund, are you able to track the money? Is one able to track the money when it goes in General Fund?

Mr. Hironaka: I'm not sure.

Mr. Trask: Okay. The County of Kaua'i's budget is about \$120 million, \$140 million, something like that, right?

Mr. Hironaka: Yes. Yeah.

Mr. Trask: And that budget is...the largest portion is General Fund, correct? That's like the total amount.

Mr. Hironaka: Yeah, I mean, yes, correct.

Mr. Trask: And so all departments of the County get money from the General Fund.

Mr. Hironaka: That's correct.

Mr. Trask: And both branches of government, Executive and Legislative, get money from the General Fund, correct?

Mr. Chun: I would just like to raise an objection just for forum sake; that it goes beyond our scope of direct and also, the direct knowledge of this witness who was called as a Planning Department representative, not as the representative for all County departments getting money from the General Fund. I'm just raising that as an objection.

Mr. Trask: And I would just state Mr. Edwards, in his questions, did ask if the Enforcement account had gone over to General Fund, and Mr. Hironaka replied to his knowledge, yes, as he's reiterated. And also, Mr. Edwards had asked if they've been comingled with the General Funds and he said yes. So I'm just...I think it is within the scope of direct and I would just...just a couple questions (inaudible).

Mr. Chun: But my question was...my objection...okay, sorry. Go ahead.

Vice Chair Ho: Gentlemen, in this matter, I favor Mr. Chun's objection.

Mr. Trask: Okay.

Vice Chair Ho: Continue.

Mr. Trask: That's fine. So when Mr. Edwards asked you about comingle with General Fund, what does that mean to you?

Mr. Hironaka: I guess I should correct my statement. I know it's turned over. I don't know where it goes. But I know it's turned over to the County. I would assume it goes to the General Fund.

Mr. Trask: And do you participate in the Planning Department's budget process?

Mr. Hironaka: Yes.

Mr. Trask: Okay. And describe the budget process very briefly.

Mr. Hironaka: Happens—

Mr. Trask: Let me just ask you. Every year, do you go beg for money from the Council from the General Fund?

Mr. Hironaka: Yes, we appear before the Council.

Mr. Trask: That's all. No further questions. Thank you. Oh, one second. No further questions from the Department.

Vice Chair Ho: Gentlemen, we are at the lunch hour. I suggest we come back at 1 o'clock to continue.

Mr. Chun: That would be fine.

Vice Chair Ho: We are in recess.

The Commission recessed this portion of the meeting at 12:02 p.m.

The Commission reconvened this portion of the meeting at 1:03 p.m.

Vice Chair Ho: Good afternoon, gentlemen. Welcome back. Welcome to the afternoon session. I believe, Myles, you are still on the stand. Myles, you are still under oath.

Mr. Chun: Good afternoon, Myles. I just have a few questions regarding the contracts that we went through this morning. So this morning I gather we were able to determine that Contract 8599 was the Committee that you sat on. Would that be correct? That's Exhibit...my Exhibit G. Oh no, the County's Exhibit G. Sorry. County's Exhibit G.

Mr. Hironaka: Which one is the County's exhibits?

Mr. Chun: The blue?

Mr. Trask: No, County's Exhibit G is Contract 8599.

Mr. Chun: 8599, yeah.

Mr. Trask: And Petitioner's Exhibit G is the selection—

Mr. Chun: Right, right.

Mr. Trask: It's actually both G.

Mr. Chun: Mine was J and yours is G. I think what you have in your hand right now is Exhibit G.

Mr. Hironaka: Yes.

Mr. Chun: Right. Contract 8599. Is that what you have in front of you?

Mr. Hironaka: Correct.

Mr. Chun: Okay. Now, we were able to determine this morning that it was because it was on Procurement F.1., which is on page 1 of that, correct?

Mr. Hironaka: Yes.

Mr. Chun: Right?

Mr. Hironaka: Correct, correct.

Mr. Chun: Okay. Now turning your attention to the County's Exhibit A, same one on your right side, and Exhibit A, which you were referred to this morning, F.1. refers to the paragraph of Exhibit A, correct? Which is on page...no page number. But paragraph F.1. of Exhibit A.

Mr. Hironaka: Correct. I see that.

Mr. Chun: You see that? Okay.

Mr. Hironaka: Yes.

Mr. Chun: And F.1. is the Department of Planning procurement, correct?

Mr. Hironaka: Yes.

Mr. Chun: In other words, the Planning Department was the one that was responsible for that contract.

Mr. Hironaka: Well, we put out the advertisement.

Mr. Chun: Right.

Mr. Hironaka: Yes.

Mr. Chun: And at that time, the Planning Director that put out that advertisement was Mr. Dahilig, correct?

Mr. Hironaka: Correct.

Mr. Chun: Now, in that contract...so that contract basically is a contract on the Planning Department; 8599.

Mr. Hironaka: I'm not sure if I understand.

Mr. Chun: 8599, which was Exhibit G.

Mr. Hironaka: G?

Mr. Chun: Yeah. Is a County of Kaua'i Planning Department contract? Initiated by the Planning Department.

Mr. Hironaka: Yes.

Mr. Chun: Okay. And as it was initiated by the County of Kaua'i Planning Department, that department would have the procurement information regarding that contract, correct? Since it was the procuring agency.

Mr. Hironaka: Yes.

Mr. Chun: Okay. And you would be...as the Administrative Officer for the Planning Department, you would have reviewed or control of that Planning Department file for that procurement?

Mr. Hironaka: Yes.

Mr. Chun: Okay. And would it be correct to say that in that contract, 8599, you did not see anything regarding any application or resume or review of Mr. Kimura's qualifications?

Mr. Hironaka: I did not. I did not see.

Mr. Chun: Okay. Now, you testified earlier on the assignment of that contract, and that's found in Exhibit N, I think. Hold on.

Mr. Trask: I, I for 8599.

Mr. Chun: Oh, I. Okay, yeah. On Exhibit I, on the Assignment of Contract for 8599, you note that Mr. Dahilig recommended that one for approval. Would that be correct?

Mr. Hironaka: Yes.

Mr. Chun: Okay. Would anything that Mr. Dahilig did in regards to the assignment of that contract, would that be in the file from the Planning Department regarding Contract 8599? In other words, would he keep any separate file or folder?

Mr. Hironaka: Oh, I wouldn't...I don't know.

Mr. Chun: But the official file would be the one that you looked at.

Mr. Hironaka: For this Assignment?

Mr. Chun: For this Assignment, right. What I'm looking for...what I'm asking you is there any documentation regarding Mr. Kimura applying for that contract? Anywhere; that you know of.

Mr. Hironaka: I wouldn't know. We didn't...I wasn't involved. We didn't handle any of that stuff.

Mr. Chun: Right. I know you weren't involved and I'm not asking...I just said have you seen anything, in your capacity as the Administrative Officer for the Planning Department, anything that you've seen that showed Mr. Kimura ever applied or was reviewed for this 8599 contract.

Mr. Hironaka: I have not seen anything.

Mr. Chun: Okay. Turning your attention to...and just a few more questions on 8599. You were asked to turn to page 7 of Contract 8599, which is Exhibit G. Do you have that in front of you?

Mr. Hironaka: Page 7?

Mr. Chun: Page 7. Turning your attention to paragraph 8. On page 7, the Consultant, which is at that time Ayabe, Chong, covenant that it had no conflict of interest; any direct or indirect interest. Do you see that paragraph?

Mr. Hironaka: Is that paragraph 8?

Mr. Chun: 8, yes.

Mr. Hironaka: Yeah, okay, I see it.

Mr. Chun: Okay. Now turn your attention to Exhibit I. Is there any paragraph in Exhibit I in which the Consultant covenants and agrees that he has no interest or direct or indirect interest that would conflict with the performance of his duty?

Mr. Hironaka: I'd have to review the whole document.

Mr. Chun: Could you take some time...could I ask for a short recess to allow the witness to just look through that document? I know...this is the first time he's asking. I don't want to rush him.

Vice Chair Ho: We'll take a 5-minute recess.

Mr. Chun: Thank you. If you could review that, Myles. Thanks.

The Commission recessed this portion of the meeting at 1:10 p.m.

The Commission reconvened this portion of the meeting at 1:11 p.m.

Mr. Hironaka: I don't see any specific paragraph entitled "Interest of the Consultant". Other than there's this paragraph 7. Paragraph, excuse me, 15.

Mr. Chun: 15? And paragraph 15, if I may—

Mr. Hironaka: Is the contract remains in effect.

Mr. Chun: Okay. So the contract remains in full force and effect except as modified by this agreement. That's the only thing that you can say that might relate?

Mr. Hironaka: Correct.

Mr. Chun: Okay. Now...and I'm moving on. (Laughter) I'm moving on. Just a few more quick questions. You testified about other Hearing Officers hired by the Planning Department.

Mr. Trask: Sorry, real fast. I would render an objection, just under the doctrine of completeness. And if the Commission would rather I withhold this objection 'til after when it's my time to cross or re-cross, I'll just say under the rules of evidence, which are lax, the doctrine of completeness does allow opposing counsel to show at the time...when a document is read, a portion of that document to refer to, at that same time, other portions of the document in order to...you know, you want to look at things in isolation, review the whole context. And the case law is you can do that simultaneously so as time doesn't pass and you lose the effect. So I'd render that objection now and like to point out other sections that would also color the answer to the last question as 15 is the only section that refers to that.

Mr. Chun: Well...go ahead. No, I'm just...

Vice Chair Ho: And you will readdress the...give us the full statement in your rebuttal?

Mr. Trask: I would just say I would argue that sections...so this is on page 2 of the Assignment Agreement, 2, 4, 5, 6, and 7 also refer either directly or indirectly to the no interest portion, Section 10, I believe, or 8 of the contract that would mean that Mr. Kimura likewise couldn't have any conflicts. So that's what I would say.

Mr. Chun: My only address, and he can address to it if he wants at his redirect or re-cross, is my question was not what the contract says. My question was is there anything in that contract in which the consultant agrees that he has no conflict.

Mr. Trask: And I would just say—

Mr. Chun: And that's argument, so I'll leave it at that only.

Mr. Morimoto: Yeah, I was going to say...you know, if you guys could speed it up.

Mr. Chun: Right.

Mr. Morimoto: Thank you.

Mr. Chun: I'm moving on, unless the Commission wants me to go back on this.

Vice Chair Ho: No, move on.

Mr. Chun: Okay. So moving on, you testified earlier, Mr. Hironaka, that there were other Hearings Officers that the Planning Commission has hired in the past, other than Mr. Nakamura and Mr. Kimura. Or did I mishear that?

Mr. Hironaka: I'm not sure if I made that statement.

Mr. Chun: Okay. Well let me--

Mr. Hironaka: But there may have been other Hearings Officers.

Mr. Chun: Let me ask this question, then, and I just...a follow through. Has the Planning Commission hired anyone else than Mr. Kimura for 904 TVR hearings?

Mr. Hironaka: No.

Mr. Chun: Okay. So Mr. Kimura is the only one they've hired for 904? I guess too restrictive. For TVR contested hearings?

Mr. Hironaka: Well, first Mr. Nakamura.

Mr. Chun: Right.

Mr. Hironaka: Right.

Mr. Chun: And then after Mr. Nakamura, have they hired anybody else other than Mr. Kimura for TVR Contested Case Hearings?

Mr. Hironaka: No, I don't think so.

Mr. Chun: Okay. That's all the questions I have, Mr. Chair.

Vice Chair Ho: Thank you, Mr. Chun.

Mr. Trask: Okay. Just one question. Mr. Hironaka, I'm going to refer you, again, to that Assignment Agreement; Joint Exhibit I, page 2. Oh, actually page 1. So fourth "WHEREAS" in the middle of page 1 where it references Hawai'i Administrative Rules, HAR. It says that a successor in interest may be recognized in an Assignment Agreement which the transferor, the transferee, and the State shall agree that (a) the transferee assumes all of transferor's obligations. Do you see that?

Mr. Hironaka: Yes.

Mr. Trask: And to your understanding, that would include any conflict of interest, duties, and responsibilities on the original contract, correct?

Mr. Hironaka: I'm not sure.

Mr. Trask: Okay.

Mr. Chun: Calls for legal conclusion, but he can answer to the best of his knowledge.

Mr. Trask: Also, on page 2, can you please read No. 2?

Mr. Hironaka: The Assignment [sic] hereby accepts this assignment and agrees to perform all of the Consultant's duties, responsibilities, and obligations under the Contract.

Mr. Trask: Okay. 4.

Mr. Hironaka: The Consultant remains liable for all obligations under the contract but waives all rights under the contract as against the County.

Mr. Trask: 5.

Mr. Hironaka: The Consultant warrants that it has no knowledge of any existing or potential claims against the Consultant with respect to the Contract.

Mr. Trask: And then 7.

Mr. Hironaka: The County recognizes the Assignment [sic] as the Consultant's successor in interest in and to the Contract. The Assignment [sic] by this Agreement becomes entitled to all rights, titles and interests of the Consultant in and to the Contract as if the Assignee were the original party to the Contract. Following the effective date of this Agreement, the terms "Contractor" and/or "Consultant" as used in the Contract, shall refer to the Assignee.

Mr. Trask: Thank you. No further questions.

Vice Chair Ho: Thank you. I guess Mr. Hironaka is ended.

Mr. Chun: Could I just have one follow through on the provisions that he just read? One question.

Vice Chair Ho: Okay.

Mr. Chun: Mr. Hironaka, do you have any independent documents in the Planning Department files to verify whether or not the Consultant has or has not any indirect or direct interest, conflict of interest?

Mr. Hironaka: I don't know of such.

Mr. Chun: Okay. That's all.

Vice Chair Ho: Do you have another witness, Mr. Chun?

Mr. Chun: Yes. I think...the Commission doesn't have any questions? Based upon what the...you know, the procedure you read, the Commission has a chance.

Vice Chair Ho: Any questions, Commissioners?

Mr. Mahoney: No.

Vice Chair Ho: No.

Mr. Chun: We are going to call Ernest Barreira.

Vice Chair Ho: Mr. Barreira, I have to swear you in. Do you swear to tell the truth, the whole truth, and nothing but the truth?

Ernest Barreira: I do.

Vice Chair Ho: Please be seated.

Mr. Chun: Please state your name, Mr. Barreira.

Mr. Barreira: Ernest W. Barreira, Assistant Chief Procurement Officer.

Mr. Chun: Okay. And how long have you served as the Assistant Chief Procurement Officer?

Mr. Barreira: A little more than 7 years.

Mr. Chun: Okay. So who is the Chief Procurement Officer?

Mr. Barreira: The Director of Finance Ken Shimonishi.

Mr. Chun: Okay. What are your duties as the Assistant Chief Procurement Officer?

Mr. Barreira: I'm the Division Chief of the Division of Purchasing that controls all formal and informal purchases for the County of Kaua'i.

Mr. Chun: Would that mean that you control the procurement of all professional services within the County of Kaua'i?

Mr. Barreira: Yes, all formal modes of procurement, including professional services.

Mr. Chun: Okay. And by saying “Division Chief”, what does that mean? Does that mean that you review the procurements and authorize them? I don’t want to put words in your mouth.

Mr. Barreira: Yes.

Mr. Chun: So like I said, what does it mean by being the Assistant Division Chief in charge of procurement?

Mr. Barreira: I am the ranking administrative officer that oversees all formal procurement and all methods of procurement within the Division; some things I have delegated authority to approve, other things are sent directly to the Director of Finance.

Mr. Chun: Okay. Would it be correct to say that the Director of Finance, as the Chief Procurement Officer, relies on your recommendations before signing off as the Chief Procurement Officer?

Mr. Barreira: That would be a fair statement, yes.

Mr. Chun: And by being the Assistant Chief Procurement Officer, would it be fair to say that the procurement process utilized by any of the departments needs to be reviewed by your division?

Mr. Barreira: Yes, that is correct.

Mr. Chun: Okay. This...and a few preliminary questions. This matter involves Contract 8599 and 8741 regarding the hiring of a Hearings Officer or Master Hearings Officer for the County of Kaua’i; one was from the Planning Department and one was the County Attorney’s Office. Have you seen those files?

Mr. Barreira: At some point—

Mr. Trask: I’m just (inaudible) an objection. One was for the Planning Department, one was for Boards and Commissions. I would just—

Mr. Chun: Okay. I will withdraw, too. Boards and Commissions.

Mr. Barreira: At some point throughout the process of procurement I would have been privy to review these documents, yes.

Mr. Chun: Okay. And you did get a request to provide a review of the files held by your division regarding those contracts. Would that be correct?

Mr. Barreira: That is correct.

Mr. Chun: And you provided them to the County Attorney’s Office?

Mr. Barreira: Yes, I did.

Mr. Chun: Okay. And all the documents you provided them were all the documents you had? Or your division had, not you had.

Mr. Barreira: That we are in control of, correct.

Mr. Chun: Right. Okay. When you provided them to the County Attorney's Office, did you review what was in those files?

Mr. Barreira: I provided a cursory review just to make sure that the documents that were provided were specifically what was requested.

Mr. Chun: Okay. Okay. In your review of those files, did you look at the applications that were filed by the different companies that were responding to the request for bids?

Mr. Barreira: Not specifically, no.

Mr. Chun: Okay. Do you recall that...would the files contain all the applications that were submitted by the public regarding those requests?

Mr. Barreira: The procurement documentation is divided into a contract folder, as well as a work folder, so the folders contain all the information relative to that particular procurement.

Mr. Chun: Right. The work folders and the contract folder...either one of them would have contained all the applications, correct?

Mr. Barreira: Yes.

Mr. Chun: Okay. And would it be correct to say...did you look at those folders? The contract and the work folders.

Mr. Barreira: Only to the extent necessary to ensure compliance with the request.

Mr. Chun: Do you know of...in your review, did you recall seeing any application or resumes filed by Mr. Harlan Kimura on any of those contracts?

Mr. Barreira: I recall the name. I would have to make reference to the specific contract folder.

Mr. Chun: Okay. For example, Contract 8599, which was the Planning Department's request for submittals, do you recall seeing Mr. Kimura's resume or application filed by Mr. Kimura on that?

Mr. Barreira: The name is very familiar. Once again, given the hundreds of procurement that we manage, I would have to make specific reference to the folder.

Mr. Chun: Would it be correct to say that if we did not find any of those documents in the documents you provided to the County Attorney's Office that it does not exist?

Mr. Barreira: It could be misfiled, but it would be very unusual not to be contained within the folder.

Mr. Chun: Assuming there was no mistake by your division, would it be correct to say that if there's no application ever found or resume found in that contract file that it does not exist?

Mr. Barreira: To include the work folder, then—

Mr. Chun: Right, including the work folder.

Mr. Barreira: That would be correct, yes.

Mr. Chun: Because the work folders were provided to the County Attorney's Office, right?

Mr. Barreira: I believe all files requested, yes, sir.

Mr. Chun: Okay. Now in regards to Contract No. 8741, the same question. You provided the work folder and the contract folder to the County Attorney's Office.

Mr. Barreira: I believe that was a request, yes, sir.

Mr. Chun: And...you don't remember what was in there, right?

Mr. Barreira: Not as I sit here today without reference, no.

Mr. Chun: Okay. Now, if I was to tell you that there were no applications or resumes of Mr. Kimura in either of those files for Contract 8741, would it be correct to say that no such application and/or resume exists?

Mr. Barreira: Once again, in reference to both contract and work folder?

Mr. Chun: Yes.

Mr. Barreira: That would be a fair assumption, yes.

Mr. Chun: Okay. And those are the only two (2) folders in your division, correct? The work folder and the contract folder.

Mr. Barreira: That we—

Mr. Chun: In your division.

Mr. Barreira: Yes, sir.

Mr. Chun: Right, right. There are other folders by other departments. For example, the Planning Department. If they were the procuring agency, they would have their own folder, correct?

Mr. Barreira: There are Division folders that are maintained by the Project Managers.

Mr. Chun: Right.

Mr. Barreira: Yes.

Mr. Chun: And I'm not asking you about those folders. If I was to show you the electronic form the files on...no, I'm not going to go down that road because that would take too much time.

Would it be correct to say that...do you recall making any determination regarding Mr. Kimura's assignment of either the Contract 8599 or 8741 and its assignment to Mr. Kimura? In other words, did you evaluate, in any way, Mr. Kimura's qualifications to be assigned those contracts?

Mr. Barreira: Any request for information for an assignment request that comes in from the departments are vetted at a higher level, so those matters are always referred to the County Attorney for legal review to ensure that it is in formal compliance with the law.

Mr. Chun: I understand, but I said, did your division do an evaluation of the qualifications of Mr. Kimura for those contracts?

Mr. Barreira: The qualification determination is made by the Review and Selection Committee members and ultimately transferred and submitted to the Division of Purchasing where we do a cursory review upon receiving the recommendation of award to ensure that the scoring is consistent with the selected party.

Mr. Chun: I see. And if there is no review by the reviewing committee, what would you do?

Mr. Barreira: We would not have necessarily reviewed such a person because it has to come in from the department as part of a recommendation of award.

Mr. Chun: I see. So if there was no review by the reviewing committee regarding that contract, you would not have approved the Assignment?

Mr. Trask: Objection, vague and ambiguous as to reviewing committee and the contract. There was a reviewing committee for the original contract. This is relating to the Assignment Agreement.

Mr. Chun: Yes. I believe his testimony...for the Assignment, the reviewing committee would do a review and submit it to his department. That's what I was asking. If the reviewing committee did not do a review of the Assignment, then would his division have approved the Assignment?

Vice Chair Ho: I'll let Mr. Chun continue.

Mr. Chun: Maybe I'll make it clearer, and I apologize if I wasn't clear. Mr. Barreira, if the reviewing committee did not do a review of the Assignment, would your division have approved that Assignment?

Mr. Trask: We'll just object as to assumes facts not in evidence. There is no evidence that there was or there needs to be a reviewing committee for the Assignment.

Mr. Chun: He testified that on assignment, the reviewing committee...

Mr. Trask: That's why I objected. It sounded like, to me, it was the original contract reviewing committee, but...

Mr. Chun: No.

Vice Chair Ho: I let Mr. Chun continue. I will let him continue again.

Mr. Trask: Thank you.

Mr. Chun: And let me take a step back.

Mr. Barreira: I understand your question and I can answer it.

Mr. Chun: Right. Okay.

Mr. Barreira: And thank you for the clarification because I did not understand your question to mean a review of the Assignment.

Mr. Chun: Okay.

Mr. Barreira: As I spoke initially, any assignment matter that arises – and they do arise on occasion – that is not something that we, in the Division of Purchasing, make a determination upon. That is referred to the Office of the County Attorney for legal review.

Mr. Chun: I see. So your department does not get involved...or not...division.

Mr. Barreira: Yes.

Mr. Chun: Does not get involved, in any way, on approving assignments of a contract?

Mr. Barreira: We're involved in terms of receiving information from the departments that such an action is desired or needed. But when it comes to matters of the law to that nature, it is referred for legal review and compliance.

Mr. Chun: But isn't it correct that under the rules, the Chief Procurement Officer has to review and sign off on Assignments?

Mr. Barreira: That is true and that's also contained within the General Terms and Conditions for professional services contracts, but it does not mean that we do not consult to ensure that we're conforming within the law.

Mr. Chun: I didn't say consult, but I was just saying...I was asking the question, is it true, under the rules, the Chief Procurement Officer has to make its own determination whether or not to approve an Assignment?

Mr. Barreira: That is correct, but I am here to testify to the whole truth and it requires legal review.

Mr. Chun: Okay, and I didn't ask about legal review. When it reviews...to approve an assignment, what facts does the Procurement Office Division look at?

Mr. Barreira: We would receive the request--

Mr. Chun: Okay.

Mr. Barreira: And forward the particulars to the Office of the County Attorney to ensure that it conforms to the law.

Mr. Chun: Okay. So you...and I don't want to put any words in your mouth, so you review the request and then you just send it over to the County Attorney's Office. Is that what you're saying?

Mr. Barreira: Because it is a matter of contract administration.

Mr. Chun: I'm just asking to confirm that that's what you said; you get the request and you forward it to the County Attorney's Office.

Mr. Barreira: Yes.

Mr. Chun: Correct? Okay. Now, if there is no application filed by the person to which the Assignment is being made, is that an issue with the Purchasing Division?

Mr. Barreira: Can you restate that again, please?

Mr. Chun: If the person, which the assignment of the contract has been made to, never applied for that contract, is that an issue with the Purchasing Division?

Mr. Barreira: In terms of what is contained within the General Terms and Conditions, it requires 3-party review and approval.

Mr. Chun: Okay. Let me ask the question again. Is the fact that an application—

Mr. Trask: I'll just object. This is the third time he's asked and his question has been answered. (Inaudible)

Mr. Chun: No, he's never...he has never answered the question. I just said—

Mr. Trask: Well, he may not have answered it to your liking, but he has answered it.

Mr. Chun: No, I don't...I object to his trying to say what my liking is. I just asked a simple question, does the fact that an application was never filed, is that a factor? And I didn't hear an answer.

Vice Chair Ho: I side with Mr. Trask on this one. Please, Mr. Chun.

Mr. Chun: Who does an evaluation of the qualification of the person who wishes to have a contract assigned to it?

Mr. Barreira: It is a collective responsibility that starts at the department level.

Mr. Chun: And ends with who?

Mr. Barreira: Ultimately, the Assignment Agreement has to be approved by the Director of Finance.

Mr. Chun: As the Director of Finance, what facts does the Director of Finance look at?

Mr. Barreira: I believe it looks at what is...to ensure that there is compliance as the law requires and the General Terms require.

Mr. Chun: Does it look at the...for example, in this contract, it's for a professional service. Does the Director of Finance look at the resume of the Assignee?

Mr. Trask: Objection, assumes facts not in evidence. I think he's established via Mr. Hironaka and Mr. Barreira, they know of no resume, and so what is—

Mr. Chun: That wasn't the question. I said as an assignment, he said they have to determine whether or not it's... I just asked the question as a matter of fact...do you look at the resume?

Mr. Trask: And that's what I'm saying. It assumes there's a resume. I just object to the form of the question.

Vice Chair Ho: Mr. Chun, continue. Mr. Chun, I favor—

Mr. Chun: I get these answers from you but they're so general I just don't know what you did. You have an assignment of a contract, you get the request, you send it over to the County

Attorney, but then you say the Director of Finance has to be assured of that it meets the qualifications. So (inaudible) how do you know by the Director of Finance the Assignee meets the qualifications of the contract?

Mr. Barreira: We would defer to the guidance that is provided in total review by the County Attorney.

Mr. Chun: Okay. Right. So the Director of Finance does not review it all.

Mr. Barreira: The Director of Finance...you're asking me to speak for the Director of Finance. I am not the Director of Finance, so I cannot state that.

Mr. Chun: No, I'm asking you, as the person who recommends and who the Director of Finance relies on, do you look at a resume or application or other information regarding the Assignee to recommend to your director whether to approve it or not?

Mr. Barreira: I am not in the position of recommending matters of assignment because it is contract administration.

Mr. Chun: Right. So your answer is you don't do that.

Mr. Barreira: I do not generally do that in terms of Assignments.

Mr. Chun: Your division does not get involved with reviewing the qualifications of assignees.

Mr. Barreira: That is not the process that is normally entertained.

Mr. Chun: So your answer to my question is no, you do not review the qualifications of assignees.

Mr. Barreira: In the context of—

Vice Chair Ho: Mr. Chun, a moment, please. Have you gotten to the point in the questioning where you have a decent answer?

Mr. Chun: (Laughter) Not yet. (Laughter) But all I want to find out is who...and I'm getting there and I think the final answer is going to be it's the Department. I think that's what he's saying.

Mr. Mahoney: Could I ask a question?

Mr. Chun: Yeah.

Mr. Mahoney: Could that be simplified? I mean, there's about fifteen (15) questions tied into one (1). So if you could maybe get direct to the point, ask a simple question, get an answer, and move on because I think we're dragging this one on way too long.

Mr. Chun: Let me...if I can? Mr. Barreira, what agency in the County of Kaua'i verifies that an assignee of a contract meets all the qualifications to be performed under the contract?

Mr. Barreira: In terms of an Assignment?

Mr. Chun: Yes, that's what I said. Yes.

Mr. Barreira: It is a collaborative process that is initiated by the Department, but ultimately validated by the County Attorney and signed off by the Director of Finance.

Mr. Chun: Okay. And (inaudible) because you kept on saying collaborative, which means somehow your division is involved in that, okay? So based upon your answer that it's a collaborative, what involvement of that collaborative effort does your division have? Other than just sending it over to the County Attorney's Office.

Mr. Barreira: We are the central holding place of all contracts that are executed in the County. So anything that has an impact on a County contract file will be processed through us. Our degree of involvement is much less in a contract administration matter.

Mr. Chun: I'm trying to make it as simple... What involvement, other than...because you said it's collaborative so collaborative means you have an involvement, so I'm just trying to narrow it down as part of the... Other than just sending the paperwork over as part of this collaborative involvement you have in Assignments – I'm not talking about any other contract, but Assignments – what else does the Purchasing Division do?

Mr. Trask: I object at this point. I think this is the tenth time this question has been asked and answered, and I think we can simply refer to Joint Exhibit I and Joint Exhibit P, which maybe if Mr. Chun can refer Mr. Barreira to review those. These are the actual Assignment Agreements. They dictate the terms and conditions of them which is whereas, the Assignee is competent, qualified, ready, willing, and able to render the services; the County finds this Assignment is in the best interest of the County; and the County, the Consultant, and the Assignee mutually agree to the assignment of this contract – which sounds to me like the collaborative effort. He can then cross-reference HAR 3-125-14 regarding novation and assignments of contracts. And then if you look on the third page of said Assignment Agreements, both of them, they are all signed by the Director of Finance.

Mr. Chun: I object to this...that's not the questions I'm asking.

Vice Chair Ho: Mr. Chun, (inaudible).

Mr. Chun: He's trying to make his argument now through his objections.

Mr. Trask: I'm thinking they will get to his answer. You're right. Those aren't my questions.

Mr. Chun: Right.

Mr. Trask: But I think that's what...the answers you want.

Mr. Chun: No, that's not the answers I want. I'm just asking a simple question, what do you do?

Mr. Trask: Well then (inaudible).

Vice Chair Ho: Mr. Chun, please. I said with Mauna Kea on this one. I think you've asked it enough times. If you can get to the point in the next couple of questions, continue, but please.

Mr. Chun: Okay. Does the Division review the resume of an assignee of a contract?

Mr. Barreira: As I answered in the past, we do not.

Mr. Chun: Okay. Does your division review any application filed by an assignee of a contract?

Mr. Barreira: Do we review it for critical compliance?

Mr. Chun: Yes.

Mr. Barreira: No. That is something we review and refer.

Mr. Chun: Okay. Now going on to Exhibit I, which was referenced by the County Attorney in this matter, which I think is the one on your right side, Ernie. Do you have that in front of you, Mr. Barreira?

Mr. Barreira: I do.

Mr. Chun: Now, in your division's processing of this Assignment of Contract 8599, it cites to Title 3, Subsection [sic] 11, Chapter 125, Section 14(2) as a basis for the assignment of the contract. Do you see that portion in Exhibit I? Page 1.

Mr. Barreira: Referring the Contractor's Certificate of Compliance?

Mr. Chun: No. Administrative Rule, Title 3, Subtitle 11, Chapter 125. The one with the green backing.

Mr. Barreira: Very good. I have it.

Mr. Chun: Okay. Do you have the correct one? Exhibit I and that set?

Mr. Barreira: I do.

Mr. Chun: Okay. On page 1 of Exhibit I, it references Hawai'i Administrative Rule, HAR, Title 3, Subtitle 11, Chapter 125, Section 14(2). Do you see that area?

Mr. Barreira: Yes, sir.

Mr. Chun: Okay. And that rule states that when in the best interest of the State, a successor in interest may be recognized in an Assignment Agreement which the transferor, the transferee, and the State shall agree. Do you see that portion?

Mr. Barreira: Yes, sir.

Mr. Chun: In regards to the County it refers to the...it could mean the County rather than the State, correct?

Mr. Barreira: That is correct.

Mr. Chun: Okay. And would it be correct to say that would be the rule that the Purchasing Division relied on to accept the assignment of the contract? That was the rule that would authorize that assignment of the contract.

Mr. Barreira: That is governed within the Administrative Rules, yes.

Mr. Chun: Right, right. That's the only other rule...was there any other rule that was used to support this assignment to your knowledge?

Mr. Barreira: Not to my knowledge, no.

Mr. Chun: Okay. Because if there were, it would be included in the body of the Assignment, also?

Mr. Barreira: As would be standard practice, yes.

Mr. Chun: Okay. Now it states over here in the best interest of the State, which in this particular situation, the best interest of the County. Who makes that determination whether something is in the best interest of the County? Would it be the Chief Procurement Officer or the department, the Procuring [sic] Department?

Mr. Barreira: Ultimately, pursuant to the law, it's the Director of Finance that signs off and approves.

Mr. Chun: Okay. What facts does the Director of Finance rely on to determine that it's in the best interest of the County?

Mr. Barreira: It would be a number of factors.

Mr. Chun: Okay. I know and I'm going to try to bring it down because I don't want you... In this particular contract, do you recall what specific facts were provided to the Division to support that it was in the best interest of the County? Do you recall?

Mr. Barreira: Absent a complete review of the file, I could not answer that.

Mr. Chun: Okay. Would it be written anywhere in your file? Not your file, but in the Division's file, would those facts be presented to your division to support it?

Mr. Barreira: Once again, not...it could be. They could have initiating documents that come through us, but the dialog that occurs beyond the scope of our authority, I would not be privy to.

Mr. Chun: Right. No, I understand that. And correct me if I'm wrong, the facts that the Division would rely on could be included in the requesting form; the form requested by the Department, it could be in there.

Mr. Barreira: In the standard course, and once again, not making specific reference here, we would be told of the need for an assignment at which point we would direct that the Project Manager engage with the County Attorney for legal review.

Mr. Chun: Okay, okay. And would there be a written documentation of those facts or that dialog, as you said?

Mr. Barreira: I could not speak to what happens when the dialog with the County Attorney and the Project Manager occurs.

Mr. Chun: Okay. Would your division--

Vice Chair Ho: Just a moment. Something is wrong with that lady.

Mr. Chun: If I may?

Mr. Trask: That's his client.

Mr. Chun: That's my client.

Vice Chair Ho: Please do.

Mr. Chun: Can we take a short recess?

Vice Chair Ho: Yes.

The Commission recessed this portion of the meeting at 1:45 p.m.

The Commission reconvened this portion of the meeting at 1:46 p.m.

Vice Chair Ho: Okay, Mr. Chun.

Mr. Chun: Okay. (Laughter) Okay, if I asked this question, you can stop me. I don't remember exactly where I stopped. Now, would the reasons, the reasons given by the Department for being in the best interest of the County, would that be in a written form somewhere in your division's file?

Mr. Barreira: I would have to check the file. I cannot speak to the case in particular.

Mr. Chun: So in this particular one, you don't know?

Mr. Barreira: I'm not certain without having a review of the file.

Mr. Chun: Fair enough. In general, would it be practice that it should be in writing somewhere in the file? Would that be a practice?

Mr. Barreira: Assignments and novation happen rather infrequently.

Mr. Chun: Okay.

Mr. Barreira: And once again, when it comes to matters of contract administration, we are not engaged directly in those discussions because the procurement process, at the point of award, diverts to the Project Manager in terms of managing that contract.

Mr. Chun: So in general, you leave it up to the manager of the contract to have that kind of written documentation?

Mr. Barreira: That would be our guidance in terms of the dialog that is necessary.

Mr. Chun: Okay. So the general rule would be either it would be in your file – "your" meaning your division's file – or it would be in the Department's file?

Mr. Barreira: Anything that supports the execution of a contract or contract amendment or modification would be contained within our files.

Mr. Chun: Okay. But regarding the facts regarding the best interest, it could be in the Department's file, too.

Mr. Barreira: That is possible, yes.

Mr. Chun: Okay. So it could be...and that's what I was trying to get at. It would be an either or; either your division's file or the Department's file.

Mr. Barreira: That is true.

Mr. Chun: Okay. But it would be in some file somewhere.

Mr. Barreira: I would have to look and specifically tell you whether it's there in this particular case, but–

Mr. Chun: Yeah, and I'm not looking...because obviously you don't have it. I'm just saying in general, would it be in a written form in either the Division's file or the Procuring Department's file?

Mr. Barreira: I would say that that would more likely than not be the case, yes.

Mr. Chun: Okay. Do you know of, in this particular contract...and this is just a short answer. On these contracts, 8599 and 8741, are you aware of, as the Division Chief, reviewing a written analysis or determination of why the assignment of the contract for Harlan Kimura is in the best interest of the County? Do you recall seeing anything? Because—

Mr. Barreira: Other than the exhibit that I've read?

Mr. Chun: Yeah, other than the exhibit you read. Yes.

Mr. Barreira: I cannot speak to that now.

Mr. Chun: You don't recall seeing anything?

Mr. Barreira: At this point, I do not recall it.

Mr. Chun: And if there was, it would be in the files that you gave to the County Attorneys.

Mr. Barreira: If it exists.

Mr. Chun: If it exists?

Mr. Barreira: Yes.

Mr. Chun: Now, the other issues involving this one involves something which is called Fund 251. Do you recall that fund?

Mr. Barreira: That is the Special Fund.

Mr. Chun: Right. Do you recall that?

Mr. Barreira: Yes.

Mr. Chun: What involvement does the Purchasing Division have in regards to Fund 251?

Mr. Barreira: Only in terms of validating that funds exist to support the procurement activity.

Mr. Chun: Oh, okay. So it's just...your department just verifies that there's money in the account.

Mr. Barreira: Yeah. In order to advance a procurement, the law requires certification of funds.

Mr. Chun: Oh, okay. Do you have — “you” meaning your division, not you — but does your division have any say in regards to the disbursement of monies from that fund? (Inaudible) authorizing disbursements of monies from that fund.

Mr. Barreira: No, we do not authorize. We simply validate that the funds exist.

Mr. Chun: Right, right. In regards to Fund 251, what is the agency that determines to spend money from that fund?

Mr. Barreira: 251 is the permitting...Can you describe the—

Mr. Chun: Yeah, it's the enforcement, I think.

Mr. Barreira: Enforcement Fund?

Mr. Chun: Right. Or, whatever name, but I think its enforcement but I'm not holding you to that.

Mr. Barreira: Yeah, I can only speak to what our role is.

Mr. Chun: Right.

Mr. Barreira: I'm not sure in terms of enforcement of that fund or management of that fund, but we would simply validate that the monies exist.

Mr. Chun: Okay.

Mr. Barreira: I wouldn't want to testify to something that I don't have direct control over.

Mr. Chun: Okay. So you recall submitting an affidavit in Case No. CC-2016-9. Do you recall signing an affidavit in that matter?

Mr. Barreira: Could you point me to that?

Mr. Chun: I can show you.

Mr. Barreira: Yes, thank you. Yes, that is my signature.

Mr. Chun: Yeah. And you remember signing that, correct?

Mr. Barreira: Yes, I do.

Mr. Chun: In paragraph 5, you state that Harlan Y. Kimura's compensation as a Hearing Officer is (inaudible) not derived from any funds on deposit in the Planning Enforcement account with Fund 251. Is that your understanding?

Mr. Barreira: Yes, it is.

Mr. Chun: But you don't – "you" meaning your division – does not control what is paid out from Fund 251. Is that correct?

Mr. Barreira: No, but we would see the source of funds that support the procurement.

Mr. Chun: Right, right. So you're just reporting that you haven't seen any request for payment from Fund 251 to Mr. Kimura?

Mr. Barreira: I don't see the request for payment, but I do see the request for fund certification.

Mr. Chun: Right, right.

Mr. Barreira: Yes.

Mr. Chun: But as far as you know of, you have not seen any request for payment from that fund to Mr. Kimura.

Mr. Barreira: That is outside of the scope of our (inaudible).

Mr. Chun: Oh, okay. So you wouldn't even see it then?

Mr. Barreira: No. Those requests for payments are made at a different division.

Mr. Chun: Oh, okay. So if Mr. Kimura was paid from Fund 251, you would never see that.

Mr. Barreira: No.

Mr. Chun: And you're not addressing that at all in this affidavit.

Mr. Barreira: No.

Mr. Chun: Okay. Now, you also state on paragraph 6, Harlan Kimura's funding comes directly from the fiscal year operating budget for the County of Kaua'i. You have independent knowledge of how his payment is made on the operating budget?

Mr. Barreira: Based on the fund certification, it is Fund 001, which is the General Fund of the operating budget of the County.

Mr. Chun: But your department does not get involved with the operating budget for the Planning Department.

Mr. Barreira: Only to the extent of validating that the funds exist.

Mr. Chun: Validating funds, right. But not payment of—

Mr. Barreira: No.

Mr. Chun: Okay. And you state that Mr. Kimura cannot be paid from any other sources. Upon what facts do you base that?

Mr. Barreira: Because the authorization for payment came from the General Fund.

Mr. Chun: Okay. So what you're saying is that the General Fund budget would dictate who gets paid what.

Mr. Barreira: Each fund is...funds are budgeted within specific accounts within all operating budgets, and the 001 account does reflect the General Fund expenditure.

Mr. Chun: Okay. Fund 251 is not in the General Fund, though, correct?

Mr. Barreira: It is not.

Mr. Chun: Right. And Fund 251 is entirely within the Planning Department's hands, correct?

Mr. Barreira: I prefer not to make direct testimony because I don't control that fund.

Mr. Chun: Okay. You just said...yeah, you don't control that fund.

Mr. Barreira: But I believe that is what it is, yes.

Mr. Chun: And I'm not going beyond...I'm just going to say your division does not control that fund in any way.

Mr. Barreira: It does not.

Mr. Chun: Okay. Last question, just regarding...you know, when you certify the funds, who else signs off on that form regarding the funds availability?

Mr. Barreira: Under Hawai'i Revised Statutes Section 103D-309, the Director of Finance has to certify that the funds exist and that they're being used for the purpose intended in the Budget Ordinance.

Mr. Chun: Okay. That's just the Director of Finance. Does the Procuring Department have to sign off?

Mr. Barreira: No. We simply validate that it exists.

Mr. Chun: Okay. The request comes from the Department though?

Mr. Barreira: The request comes from the Department, it's sent up to the Accounting Division for the Director of Finance to validate, and then it is electronically returned to us and we use that as validation to proceed with the procurement.

Mr. Chun: Okay. Is that part of your department's, also? The Purchasing Division. The Accounting Division is also part of yours?

Mr. Barreira: No, it is a separate division within the Department of Finance.

Mr. Chun: But your division also gets involved, other than the Accounting Division?

Mr. Barreira: We work collaboratively because we manage all finances. Every dollar that is spent in the County comes through the Division of Purchasing, but we do not facilitate payments; that is all done at the Accounting Division.

Mr. Chun: Yeah, and I'm not interested in that.

Mr. Barreira: Okay.

Mr. Chun: On that form...

Mr. Barreira: Yes.

Mr. Chun: You guys also – “you” meaning your division – in addition to Accounting, also signs off on that form.

Mr. Barreira: Only the Director of Finance.

Mr. Chun: Oh.

Mr. Barreira: The Director of Finance is the only person, pursuant to the law, that can commit to certification of County funds.

Mr. Chun: Okay. But he – “he” meaning the Director of Finance – only does that after you guys have done your review.

Mr. Barreira: Actually, it goes to the Accounting Division.

Mr. Chun: Right.

Mr. Barreira: The Accounting Division validates that the monies exist in the operating accounts.

Mr. Chun: And does the Accounting Division check with you?

Mr. Barreira: No, they do not.

Mr. Chun: Oh, okay. Okay, I have no further questions for Mr. Barreira. Does the Commission and/or the...I think the other attorneys might.

Vice Chair Ho: Before Mauna Kea begins his cross, I would like to take a 10-minute recess just to take a recess, please.

The Commission recessed this portion of the meeting at 1:56 p.m.

Commissioner Lord left the meeting at 1:56 p.m.

The Commission reconvened this portion of the meeting at 2:08 p.m.

Vice Chair Ho: We will continue again.

Mr. Chun: Thank you, Mr. Chair. I will just leave it to the other attorneys for the applicants.

Mr. Kugle: Mr. Chair, I don't have any further questions for the witness.

Mr. Edwards: I have no questions.

Vice Chair Ho: Thank you. Mr. Trask, your witness.

Mr. Trask: Thank you. Should we wait for Mr. Lord?

Vice Chair Ho: No, we're not.

Mr. Trask: Thank you.

Mr. Morimoto: Excuse me. For the record, Commissioner Lord had to leave and if he participates in the decision-making, he will either review the tape or review a transcript, or both if he participates in the decision-making. Otherwise, he will not participate.

Mr. Trask: Thank you. The Department has no objections. Mr. Barreira—

Mr. Morimoto: Yeah, do you have any objection to that?

Mr. Chun: No, that's the proper procedure.

Mr. Trask: Mr. Barreira, you stated that you are the Assistance Chief Procurement Officer. Is that correct?

Mr. Barreira: Yeah, that is correct.

Mr. Trask: And you also talked about – in your direct testimony – funds certifications and the 001 account and the 251 account, correct?

Mr. Barreira: Yes.

Mr. Trask: Are you familiar with how County budgeting works?

Mr. Barreira: I am familiar, yes.

Mr. Trask: And how are you familiar with that?

Mr. Barreira: Since 2012, I have been actively engaged as the functional Budget and Purchasing Director for the County.

Mr. Trask: Okay, and do you participate in the annual County budgetary process?

Mr. Barreira: I do.

Mr. Trask: And what is your role in that?

Mr. Barreira: I administer that process by overseeing the entire process, making sure it stays on chart in terms of timing and requirement submissions to the Council. I also engage in all budget meetings, financial reviews, and decision-making. And ultimately, I'm responsible for transmitting the operating budget and the CIP budgets to the County Council on both March 15th and May 8th.

Mr. Trask: Do you have a formal title in that regard?

Mr. Barreira: My formal title is Assistant Chief Procurement Officer, and I have volunteered since 2012 to serve in my capacity as assisting with the budget.

Mr. Trask: So you just volunteer to help with the budget? (Laughter in background)

Mr. Barreira: It's the way of modern government.

Mr. Trask: (Laughter) Okay. Thank you for your service, Mr. Barreira. So real briefly, what is the sources of funds for the County budget generally?

Mr. Barreira: Generally speaking of the 100% of general funds, 83% of that would be a result of real property taxes/revenues that is contributing to the General Fund. Up until the additional action by the Legislature, we received about \$14.5 million in transient accommodation taxes, which are also considered general funds and the rest are a mishmash of various fees that are generated by a number of departments that contribute to the General Fund.

Mr. Trask: Okay. So 83% of the budget is strictly real property tax?

Mr. Barreira: Yes.

Mr. Trask: The 251 account is a revolving fund. Do you know what revolving funds are?

Mr. Barreira: Yes.

Mr. Trask: And what are revolving funds?

Mr. Barreira: My understanding of revolving fund is it...funds that are deposited into that account remain in the account and used for specific purposes as defined by the Charter by law.

Mr. Trask: Okay. And the Planning Enforcement account...are you aware that once it goes over \$100,000, the excess goes into the General Fund?

Mr. Barreira: That is my understanding, yes.

Mr. Trask: Okay. As Volunteer Budget Analyst, are you able to track monies that would overflow, I guess, from the 251 account? Can you track them thereafter in the General Fund?

Mr. Barreira: We can document what was submitted...what was transferred to the General Fund, but not how it's expended after that.

Mr. Trask: Okay. So after it's placed in the General Fund, it just becomes...essentially like in a big general fund.

Mr. Barreira: It becomes either funds that are allocated specifically as pursuant to the Budget Ordinance or allocated as a result of subsequent money bill activity or it lapses previously into the Unassigned Fund balance, which now no longer exists because of our Reserve Policy.

Mr. Trask: And who makes the decision on that allocation as far as doing the Budget Ordinance and money bills?

Mr. Barreira: Ultimately the County Council, under the Charter, is vested the authority to enact the annual budget.

Mr. Trask: I'm going to...permission to approach the witness. Is that alright, Chair?

Vice Chair Ho: Granted.

Mr. Trask: So for the record, I'm going to show Mr. Barreira what has been admitted into evidence as Petitioner's Exhibit...we've renamed it 1, but it's A. And this is HAR and that's the entire chapter, but specifically, I want to refer to what is on 125-16; HAR 3-125-14.

So Mr. Barreira, as Assistant Chief Procurement Officer, are you familiar with Chapter 103D?

Mr. Barreira: Yes, I am.

Mr. Trask: And what is 103D?

Mr. Barreira: It is the Hawai'i State Procurement Code that governs all expenditure of public funds in the State of Hawai'i and for all counties that have adopted the Procurement Code.

Mr. Trask: Okay. And is all County procurement, including professional services, subject to Chapter 103D?

Mr. Barreira: Yes, it is.

Mr. Trask: And do you know what Hawai'i Administrative Rules are?

Mr. Barreira: Yes.

Mr. Trask: And what are Hawai'i Administrative Rules?

Mr. Barreira: The Administrative Rules are promulgated by the Policy Board which allows instruction as to the implementation of the statutes defined within the Code.

Mr. Trask: Okay. And to your knowledge, is Title 3, Subtitle 11, Chapter 125, Modification and Termination of Contracts...those are Hawai'i Administrative Rules pertaining to exactly that under the auspices of the State Procurement Code, correct?

Mr. Barreira: That is correct.

Mr. Trask: Okay. On your right, are you turned to the first page of Joint Exhibit I?

Mr. Barreira: Yes, I am.

Mr. Trask: Okay. And in the middle, Mr. Chun referenced you to that Hawai'i Administrative Section 3-125-14(2), correct?

Mr. Barreira: That is correct.

Mr. Trask: Okay. Now, to your understanding...and do you work with this HAR section?

Mr. Barreira: Yes, we do.

Mr. Trask: Okay. And based on your knowledge and training and expertise, when you do an assignment from one contractor to another, do the State law or the HARs require that a Selection Committee be formed?

Mr. Barreira: No, it does not.

Mr. Trask: Okay. Does the law or rules require that professional resumes be reviewed?

Mr. Barreira: Not at this level, no.

Mr. Trask: And I want you to look at the last page...or the second to last page of that Agreement. I'm sorry, page 3 of Exhibit I, the Assignment Agreement.

Mr. Barreira: Yes.

Mr. Trask: And do you see the signature of the Deputy County Attorney?

Mr. Barreira: I do.

Mr. Trask: The signature of the Director of Finance?

Mr. Barreira: Yes.

Mr. Trask: The signature of the Planning Director?

Mr. Barreira: Yes.

Mr. Trask: The signature of the Consultant?

Mr. Barreira: Yes.

Mr. Trask: And then on the following page, do you see the signature of the Assignee?

Mr. Barreira: I do.

Mr. Trask: And therefore, is it...I'm going to refer you now to the exhibit on your left; yeah, that one. It states – 3-125-14 – that no State contract...and when it says “State” in these rules, does that apply to counties as well?

Mr. Barreira: It does.

Mr. Trask: Okay. It says no State contract is transferable, or otherwise assignable, without the written consent of the Chief Procurement Officer or head of a purchasing agency provided that contractor may assign monies, etc. And does this Assignment Agreement comply with that requirement?

Mr. Barreira: Specifically yes, it does.

Mr. Trask: Okay. And then in (2), 3-125-14(2), the transferee has to assume all the obligations, correct?

Mr. Barreira: That is correct.

Mr. Trask: They remain liable for obligations, correct?

Mr. Barreira: Yes.

Mr. Trask: And the transferor shall continue to furnish all required bonds, but there's no bonds in this contract, correct?

Mr. Barreira: Goods and services generally do not, yes.

Mr. Trask: Okay. Mr. Chun asked you about what facts you rely on and you said essentially you would be referred to the County Attorney's Office for a legal read. Is that correct?

Mr. Barreira: That is correct.

Mr. Trask: And any facts that may or may not exist may be in the file, correct?

Mr. Barreira: Yes.

Mr. Trask: Could also, too...did you have an opportunity during the break to review Exhibit I?

Mr. Barreira: I did.

Mr. Trask: Okay. And I'm going to orient you to that first page of Exhibit I and there are seven (7) "WHEREAS" clauses. Do you see that?

Mr. Barreira: I do.

Mr. Trask: And based upon your review of the Assignment Agreement, do those seven (7) "WHEREAS" clauses state a sufficient factual basis with which to support an assignment of Contract 8599 from Contractor Richard Nakamura to Assignee Harlan Kimura?

Mr. Barreira: Based on the vetting of the entire matter with the Department and through the County Attorney's Office, we would conclude that it complies with the requirements.

Mr. Trask: Okay. And again, I'm going to have you turn to page 3 of that Assignment Agreement. And when you say that these Assignment Agreement questions would get referred to the County Attorney, you would have referred to that County...or you had relied upon that County Attorney who signed this agreement for their legal read, correct?

Mr. Barreira: Yes.

Mr. Trask: I'm going to ask you to look at – on your right – Joint Exhibit R. For the record, that's the Kaua'i Planning Commission Regular Meeting January 27, 2015. Do you see that?

Mr. Barreira: Yes, I do.

Mr. Trask: I'm going to ask you to turn to page 6. Oh, I know, first off...let's see. Page 6, above "New Business", I want you to read that paragraph immediately above "New Business".

Mr. Barreira: Starting with "Mr. Dahilig"?

Mr. Trask: Yeah.

Mr. Barreira: Mr. Dahilig noted that they are making progress to procure and appoint a Hearings Officer. They currently have approvals for money transfers with the budget to fund the hiring of a Hearings Officer. They will be relying on the Deputy County Attorney to handle the procurement hiring. They will not execute any of the contracts until such time as this particular matter is resolved.

Mr. Trask: Okay. And when you...you've been with the County how long again?

Mr. Barreira: Since April of 2010.

Mr. Trask: Okay. And so were you familiar with Deputy County Attorney Ian Jung?

Mr. Barreira: Yes.

Mr. Trask: Okay. Do you know who... You mentioned in your direct testimony the Accounting Division.

Mr. Barreira: Yes.

Mr. Trask: And their rights, duties, and obligations regarding funds certifications and payment of monies, correct?

Mr. Barreira: Yes.

Mr. Trask: And what is...do you know who Ann Wooton is?

Mr. Barreira: I do.

Mr. Trask: And who is Ann Wooton?

Mr. Barreira: Ann Wooton currently serves as the County's Grants Coordinator for the County.

Mr. Trask: Okay. And are grants at all related to Account 251?

Mr. Barreira: It would be one of many grants that would be managed by Ms. Wooton.

Mr. Trask: Okay. So out of everyone in the County, would Ms. Wooton...what she would say about that fund and grants related to that fund...she would be the specific officer—

Mr. Barreira: Yes, she is responsible for everything outside of the General Fund.

Mr. Trask: Okay. And I'm going to have you, real quick as well, refer to — on your right — Exhibit G. This is Contract 8599.

Mr. Barreira: Yes.

Mr. Trask: And turn to the final page.

Mr. Barreira: (Inaudible)

Mr. Trask: Okay. And what does that final page indicate?

Mr. Barreira: This is the fund certification that I referenced in my earlier testimony, which is a required element of procurement before we proceed with the awarding or solicitation of any procurement activity.

Mr. Trask: Okay. And that account...is that an account number? That 001?

Mr. Barreira: 001-0801 is the General Fund Operating Budget within the Planning Department.

Mr. Trask: Okay. And is that the Enforcement account?

Mr. Barreira: It is not. It is the General Fund.

Mr. Trask: Okay. Turn to Exhibit N in that same packet. And same thing, last page. For the record, this is regarding Contract 8741. And again, that account...you're familiar with that account?

Mr. Barreira: I am.

Mr. Trask: Okay. And is that the Planning Enforcement account?

Mr. Barreira: It is not. It is, once again, General Fund as indicated by 001.

Mr. Trask: Okay. And finally, just a couple more questions, as Assistant Chief Procurement Officer, do you participate in protests and procurement protests?

Mr. Barreira: Yes.

Mr. Trask: And are you familiar with State statute and Administrative Rules regarding protests?

Mr. Barreira: Yes, I am.

Mr. Trask: And are you familiar with County rules regarding protests?

Mr. Barreira: I am.

Mr. Trask: Who is this Head Procurement Officer for the State of Hawai'i?

Mr. Barreira: That would be the Administrator for the State Procurement Office currently held by Sarah Allen.

Mr. Trask: Okay. And again, you said that the County Chief Procurement Officer is the County Director of Finance.

Mr. Barreira: As defined by statute and rule, yes.

Mr. Trask: Okay. And can the State Procurement Administrator...does she have the power to control and administer the County of Kaua'i's procurement process?

Mr. Barreira: Not in terms of final decision-making. Only in terms of providing advisory information relative to procurement.

Mr. Trask: And isn't it true that under 103D-207, all rights, powers, duties, and authority relating to the procurement of goods, services, and construction, and the management, control, warehousing, sale, and disposal of goods, services, and construction now vested, or exercised by, the governmental bodies of the State and counties are hereby transferred to the respective chief procurement officers.

Mr. Barreira: That is correct.

Mr. Trask: And under 103D-205, doesn't that state that...for their respective jurisdictions and unless otherwise specifically provided, each Chief Procurement Officer shall serve as the central procurement officer for the respective jurisdictions; in this case, the County?

Mr. Barreira: That is correct.

Mr. Trask: Okay. Under the Procurement Code, State law, State rule, and County rules, are the remedies of a procurement protest limited?

Mr. Barreira: They are.

Mr. Trask: And how are they limited?

Mr. Barreira: Essentially, the law outlines – both in the Statute and the Administrative Rules – that a party must be an aggrieved party relevant to the procurement at hand.

Mr. Trask: And what does that mean?

Mr. Barreira: In other words, someone who was actively engaged in the procurement process; that was directly involved in the procurement process.

Mr. Trask: So if a party did not submit resumes to participate in the procurement, do they have standing to contest that procurement?

Mr. Barreira: Based on...now, once again, Counselor, anyone can protest. The question is will they have legal standing. In our past experiences since April of 2010, when those situations have arisen, the County Attorney has concluded that they did not have standing.

Mr. Trask: And is that your understanding, independent of the County Attorney, your own understanding as the Assistant Chief Procurement Officer of Procurement Law?

Mr. Barreira: Yes, sir, that is correct.

Mr. Trask: Are there timing limitations as far as how long you have until someone can file a protest and contest the procurement?

Mr. Barreira: There are. There are two (2) vehicles available to parties to file a protest. They can either protest the content of the solicitation or they challenge that it was either not legal or prejudicial in some way, or they can contest and protest the awarding of the solicitation.

Mr. Trask: And what are the respective timelines for those protests?

Mr. Barreira: Well, the first one, in terms of protesting the content of the solicitation, any time before bid opening. Once the award is issued, I believe they have five (5) working days or seven (7) calendar days to file a formal protest.

Mr. Trask: Okay. So when you say the content of the solicitation, I want you to – on your right – turn to Exhibit A; the first one.

Mr. Chun: If I may, Mr. Chair, just raise an objection to the line of questioning. I don't believe...at least my clients have not opposed the initial contract to Mr. Nakamura. It's the assignment of the contract. So if the questions are aimed at the assignment, I can see where this is going, but I don't think anybody is protesting the initial awarding of the contract to Nakamura.

Mr. Trask: Okay, well I–

Mr. Chun: Unless I gave the impression I was.

Mr. Trask: Oh, no–

Mr. Chun: I don't think I was.

Mr. Trask: We spent so much time on the initial contract, I thought that was an issue. But if they'll stipulate that they are not contesting the initial review of the resumes, the scorings and everything like that–

Mr. Chun: We're not. I mean, I'm willing to say that. I'm not too sure about the other counsel, but I don't believe I made any representations that we object to the scoring of the initial applications on either of the contracts. I don't think I've ever said that.

Mr. Trask: Okay.

Vice Chair Ho: Mr. Chun, you had your time. I think Mauna Kea can proceed.

Mr. Trask: I'll take that. Okay. So I'm going to then orient you, Mr. Barreira, to – on your right – Exhibit I, and this is the Assignment of Contract 8599. So if you look on the third page again, this Assignment Agreement was executed April 21, 2015. Do you see that?

Mr. Barreira: Yes, I do.

Mr. Trask: And so how long after this Assignment Agreement was implemented, I guess, or agreed upon would a party with standing have the ability to contest it?

Mr. Barreira: I would have to do legal research, but I do not believe that this action is subject to the protest as defined within the Statute and the Administrative Rules.

Mr. Trask: Are you aware of any statute or administrative rules that would allow protests of this Assignment Agreement?

Mr. Barreira: Not to my knowledge, no.

Mr. Trask: Thank you. No further questions.

Vice Chair Ho: Thank you. Mr. Chun, you...

Mr. Chun: Yeah, I just have a few. So Mr. Barreira, going back to Exhibit I again, page 1, you were asked questions regarding the specific rule cited in that Exhibit I.

Mr. Barreira: Yes.

Mr. Chun: You recall that question?

Mr. Barreira: Yes.

Mr. Chun: In that rule being cited, it says "successor in interest". What does the term "successor in interest" mean in your interpretation as the Assistant Chief Procurement Officer?

Mr. Barreira: Once again, Counselor, that requires the legal determination and that is why we refer that matter.

Mr. Chun: Okay. So you didn't make a determination on who was the successor in interest.

Mr. Barreira: No.

Mr. Chun: Okay. And you just relied on the County Attorneys for that interpretation.

Mr. Barreira: And the ultimate decision by the Director of Finance, yes.

Mr. Chun: Who relied on the County Attorney.

Mr. Barreira: Yes, sir.

Mr. Chun: And the County Attorney's Office...you were – not you but your division and the Director of Finance – were relying on the County Attorney for the legal interpretation as its legal counselor, correct?

Mr. Barreira: As each time a situation arises.

Mr. Chun: Right.

Mr. Barreira: Yes.

Mr. Chun: What I'm asking for is that...it's Attorney-Client, correct?

Mr. Barreira: Yes, sir.

Mr. Chun: Yeah. And just to confirm, you don't believe...even if my clients were to file a protest of the assignment of a contract that was executed on April 20, 2015, you believe it could not do so because they have no standing?

Mr. Barreira: I believe that...I cannot speak to standing. I can speak to what is allowed in the law in terms of a protest filing.

Mr. Chun: Okay. Is not allowed. And your understanding.

Mr. Barreira: Yes.

Mr. Chun: I'm not asking—

Mr. Barreira: Based on assignments, yes, sir.

Mr. Chun: Okay. Assignments can't be subject to a protest.

Mr. Barreira: Not pursuant to what is contained within the Statute.

Mr. Chun: So my clients had an issue with the way it was assigned. As far as the Division of Purchasing, it has no remedy.

Mr. Barreira: With regard to the Procurement Code, yes, sir.

Mr. Chun: Right. One last question regarding the successor in interest issue; Exhibit I. Did the County Attorney also issue an opinion in regards to whether or not the transferor – which was Ayabe, Chong, Nishimoto, Sia, Nakamura – can continue with the obligations?

Mr. Barreira: I cannot speak to that. I'm not—

Mr. Chun: It was something to be determined by the County Attorney's Office.

Mr. Barreira: Yes, sir.

Mr. Chun: Okay. Which is your attorney.

Mr. Barreira: Yes.

Mr. Chun: Yeah, because I can't ask you what your attorney told you. (Laughter) Okay. No further questions. Thank you.

Mr. Trask: Real briefly.

Vice Chair Ho: Yes.

Mr. Trask: Mr. Barreira, to your...and for the record, I have a copy of 103D-104. May I approach the witness?

Vice Chair Ho: Yes.

Mr. Trask: Mr. Barreira, I handed you a copy of Michie's Hawai'i Revised Statutes, specifically 103D-104. Can you see what the title of that section is?

Mr. Barreira: Definitions.

Mr. Trask: Okay. Is anywhere in there...does it contain a definition for "Assignment"?

Mr. Barreira: I do not see it, no.

Mr. Trask: Okay. And they're in alphabetical order, right?

Mr. Barreira: Yeah, so it does not exist, no.

Mr. Trask: How about "Assignee"?

Mr. Barreira: No.

Mr. Trask: "Successor in Interest"?

Mr. Barreira: No.

Mr. Trask: "Transferor"?

Mr. Barreira: No.

Mr. Trask: "Transferee"?

Mr. Barreira: No.

Mr. Trask: Okay. I want you to turn to – on your left, the blue packet – and the first Exhibit A and/or 1 for the record. And that's the HAR specifically regarding...well, 14 pertains to the

assignment, and that's 125...page 125-16 pertains to assignment. But is there a "Definition" section in that HAR?

Mr. Barreira: I do not...in this particular chapter, no.

Mr. Trask: Okay. And to your knowledge, is there any definition for "Assignment" or "Assignee" in any of the State statutes or State rules?

Mr. Barreira: I could not speak to that. I would have to do the research to find that out.

Mr. Trask: Thank you. No further questions.

Vice Chair Ho: Thank you.

Mr. Trask: And I guess at this time, Department would move to...because we did the research. We just take judicial notice that "Assignment" and "Assignee" are not defined anywhere in State statute or Administrative Rule subject to Petitioner's objection.

Mr. Chun: The rules will speak for themselves. If there's any rule...what I would say, if there's a rule, there's a rule. If there's a law, there's a law. But I would agree it's not in 103D, and it's not defined in the...3-125.

Mr. Trask: Thank you. No further questions.

Vice Chair Ho: Mr. Chun, you have another witness?

Mr. Chun: No questions. Oh, no further questions. I think...if the Commission has any questions.

Vice Chair Ho: No.

Mr. Chun: And I think Intervenors, also.

Vice Chair Ho: You're free to go.

Mr. Barreira: Thank you, Chair.

Mr. Chun: Okay. No further questions. We would like to call Lloyd Unebasami as the next witness. We have to get him. I think he's in an air conditioned room.

Vice Chair Ho: Yes.

Please state your name and I have to swear you in. You are...?

Lloyd Unebasami: I'm Lloyd Unebasami.

Vice Chair Ho: Okay. I have to swear you in, Lloyd.

Mr. Unebasami: I'm sorry?

Vice Chair Ho: I have to swear you in.

Mr. Unebasami: Oh.

Vice Chair Ho: Do you swear to tell the truth, the whole truth, and nothing but the truth?

Mr. Unebasami: Yes.

Vice Chair Ho: Thank you.

Mr. Chun: We already know your name, Mr. Unebasami, so what is your educational background, Mr. Unebasami?

Mr. Unebasami: I was born and raised in Hawai'i, went to McKinley High School, University of Hawai'i. I graduated with my Bachelor's in Accounting. I got my Certified Public Accounting [sic] Certificate in 1974. So that's my educational side of it.

Mr. Chun: Okay. And after graduating from the University of Hawai'i, what's your employment background?

Mr. Unebasami: Well, I started off as an auditor so I could become a Certified Public Accountant, worked for several large corporations thereafter; (inaudible) Corporation. Then I went into State...and some other companies. And then I went into State government in 1985; started off with HCDA, and then I became a Deputy Director of the Department of Taxation under Waihee, Deputy Controller under Waihee, and he nominated me to become the first Chief Procurement Administrator in 1994. But that was under Cayetano at that point so Cayetano also appointed me in his term. So I became the Chief Procurement Administrator from inception, July 1, '94, to June 2000. At that point, I went to Hawai'i Tourism Authority as their Administrator from the year 2000 until 2009, and I retired out of State government. And then I had a short stay at RCUH, Research Corporation of the University of Hawai'i, for about a year and a half. And then I'm totally retired now for the past 6 years.

Mr. Chun: So would it be correct to say, Mr. Unebasami, that you were the first Chief Procurement Officer under HRS Chapter 103D?

Mr. Unebasami: Yes. Yes, I was the first Administrator of the new law that was effective July 1, 1994.

Mr. Chun: And even before the passage of HRS Chapter 103D, you were with the State of Hawai'i, also.

Mr. Unebasami: Yeah. I was the Deputy Controller from '93 to '94. At that time, the bill was in the Legislature and I had an opportunity, I think, once to take the place of the Controller to testify on behalf of the bill.

Mr. Chun: So as the Deputy Controller and also working in the Controller's Office in the State of Hawai'i while the bill was being considered, were you aware of the concerns being raised by the Legislature regarding the prior law, 103, versus the need for the 103D?

Mr. Unebasami: Yeah. Knowing I was an outsider coming into the State of Hawai'i back in 1985, I realized what was going on in State government; that was a little different from private sector. Private sector we have policies and procedures that we deal with accounting, procurement, and things of that type. State government was sort of lax in that area. We had a law that anything under like \$4,000, you use a small purchase method. It's almost like you could go out and just buy anything under \$4,000. Anything after that, I think the law basically stated that you go out to a competition and then you get referred back...if I recall right, you go back to Chapter 102 that has a process for a request for proposal; a very small process. So what was happening at that time is that there was a push to make all of State government...and when I say "State government", it includes the counties, the Board of Water Supply, Department of Education, University of Hawai'i. There were concerns that everybody had their own process; that a vendor would go to various organizations and not have the same process to participate in providing their goods, services, or construction. So at that time, there was a neighbor island senator that took the flag and said we need a procurement code, so he rallied. And at that time, also, the Model Procurement Code was going all over the Nation, so several states adopted it. The Model Procurement Code was written by the vendors' attorneys because the vendors felt that they needed some consistent method to deal with governments to, again, provide for goods, services, and construction in a fair manner. So that's what was going on in the Legislature of, I guess, '93 and '94, and it was passed in '94 and it became effective July 1, 1994. What it was trying to accomplish was for vendors to be able to be treated fairly by all State government, that they knew the process, that if they came to Kaua'i or if they did it on O'ahu, the rules would be the same; you know, they had a fair chance of getting a contract. But prior to that, everybody had their own game. So again, consistency was important, fairness was important, being transparent was important, also, as to how you got the job or not get the job. So those were the things that were highlighted and were talked about as to why we needed a procurement code.

Mr. Chun: Now, as the first Chief Procurement Officer for the State under 103D, did you participate with the adopting of the rules governing that Chapter 103D?

Mr. Unebasami: Yes.

Mr. Chun: And what was your involvement in the drafting of these rules?

Mr. Unebasami: Okay, well first of all, Chapter 103D, for it to work...it was written that you needed rules. So we had to go back to the Legislature and say we need interim rules, powers because it will take longer to have rules that was in place with...I forgot what chapter it was for us to get rules promulgated. So with my staff of procurement officials at DAGS, I was in charge of making sure that we came up with interim rules first and we went through every county. We

actually went around the State three (3) times to talk about the interim rules, get comments, make it better. So we went around, made it better, made it better, made it better. It took us 2 years to go through the process of promulgating rules that everybody agreed upon.

Mr. Mahoney: Could I ask a question, please?

Mr. Unebasami: Yeah.

Mr. Mahoney: Could we get to something that's like 2017? That's relevant right now; not how the rules were formed, but direct some questions that are relevant to what is at hand.

Mr. Chun: Sure.

Mr. Mahoney: Not the history of—

Mr. Chun: We can do that. Yeah.

Mr. Mahoney: Please. Thank you.

Mr. Chun: We can do that.

Mr. Mahoney: I appreciate your experience and all, but I think the relevance is now. And if the questions could be directed towards what we're having right now, I think it would be helpful to everybody.

Mr. Chun: I could do that if the Commission—

Vice Chair Ho: I can see where Lloyd is going with that, but yes, Mr. Mahoney has a good point.

Mr. Chun: Sure. Just one more question then. Mr. Unebasami, if you look at the package on your left, Exhibit A, which are the rules; at least one part of the rules, 3-125. Do you see those?

Mr. Unebasami: Yes.

Mr. Chun: Did you and your staff participate in the initial drafting of those rules?

Mr. Unebasami: Yes.

Mr. Chun: Okay. Now, turning your attention to 3-125-14 of those rules in front of you. Do you have that particular rule?

Mr. Unebasami: Okay, yes.

Mr. Chun: Okay. Sub-point 2 talks about "Recognition of successor in interest; assignment". Do you have that portion?

Mr. Unebasami: Yes.

Mr. Chun: Is that rule intended to cover just any assignment? Or assignments to just successors in interest?

Mr. Trask: Objection, lack of foundation.

Mr. Chun: What is your...let me rephrase the question. Mr. Unebasami, when you and your staff drafted that rule, what was in mind in terms of what is a successor in interest?

Mr. Trask: Objection, lack of foundation.

Mr. Chun: I think it is proper.

Mr. Trask: If I just make my record, offer of proof. Not offer of proof, but just objection, if I could articulate it. It just goes to his qualifications. The Department is not contesting that Mr. Unebasami was not the first State Procurement Officer, or that at one time he was a very important person, or participated substantially in this. If you look at the final page, he is not a signatory to these rules. Oh, this is not...according to the copy that I printed off the internet, it's signed by Robert E. Oyama, Chairperson, Procurement Policy Board; Sam Callejo, State Comptroller; Governor Cayetano; and a Deputy AG, who I don't know who that is. I just don't think the foundation has been laid that he can interpret what this means.

Vice Chair Ho: I'll follow Mr. Trask, please.

Mr. Chun: In that case then, we can go back to the original line of questions that the Commissioner was objecting to before, in terms of the background. So if the Commission wants, I could go back there and work our way up in terms of the initial drafting of the rules and the participation in that and his involvement; it was the initial drafting of rules back in 2007 [sic].

Mr. Trask: Well, again—

Mr. Chun: (Laughter) I can do that.

Mr. Trask: We can stipulate to that, but I still would say lack of foundation. And just as an analogous argument, Arthur (inaudible) Trask Sr. was an original signatory to Hawai'i State Constitution. That does not mean that he is, in any way, capable of interpreting that document. How it is, is executive legislative passes, executive prosecutes, and the courts interpret. And to and until they Mr. Unebasami is legally able to interpret these rules, we just say it lacks foundation.

Mr. Chun: Mr. Chair, if you want, I could go back and...from 1997 when these rules...regarding his involvements, his interpretation, his application as Chief Procurement Officer even after the rules, and then we can work our way up if that's what the Commission decides to want to have done; we will do that.

Mr. Morimoto: Excuse me. Mr. Chun, is there an ambiguity in the rule that requires interpretation?

Mr. Chun: According to...there was an interpretation by the County Attorney's Office which we don't know what that interpretation is. So I want to set it in front of the Commission what that interpretation should be under the rules.

Mr. Morimoto: But don't the rules speak for themselves? Is there a...I'm trying to find out why he needs to testify about what it means if there's no ambiguity.

Mr. Chun: I believe there is ambiguity in terms of the County Attorney's Office interpreting, but I don't know what that interpretation is because it's Attorney-Client Privileged.

Mr. Morimoto: So setting aside the County Attorney's interpretation, with regard to the rule itself, the language of the rule itself, is there some ambiguity that you're pointing to?

Mr. Chun: I believe a proper interpretation would be a successor in interest is a company. A successor of a company—

Mr. Morimoto: Setting aside that, I'm asking you, is there a question about the language? Is there an ambiguity in the language that would require...sorry, I can't pronounce your name.

Mr. Unebasami: First name Lloyd.

Mr. Morimoto: Okay.

Mr. Chun: I would say yes.

Mr. Morimoto: The witness'—

Mr. Chun: Yes. I would say based upon the actions of the County Attorney's office, yes. There seems to be an ambiguity in terms of the meaning of the word (inaudible).

Mr. Morimoto: Setting aside the County Attorneys, I'm talking about the language itself.

Mr. Chun: Yes.

Mr. Morimoto: In the—

Mr. Chun: Yes.

Mr. Morimoto: In the rule—

Mr. Chun: I would say yes.

Mr. Morimoto: Okay, and what is that?

Mr. Chun: I would say based upon the interpretation of the County Attorney and the Assistant Chief Procurement Officer, they have interpreted it in a way which is inconsistent with what the language (inaudible).

Mr. Morimoto: Okay, and so can't you just argue that? That they erroneously interpreted the rule? Does it really require the witness' edification?

Mr. Chun: Yes.

Mr. Kugle: I would also add that we just heard from the last witness that that term "successor in interest" and others are undefined in the Statute and the Rules, and I think this will greatly inform the Planning Commission about a provision which they find written into the Assignment Contract that we're talking about, the rules that they've been asked to review, the things that are in evidence, so I think that it makes eminent sense for Mr. Unebasami to explain exactly what that means.

Mr. Trask: And I would just--

Mr. Morimoto: What the term "successor in interest" means?

Mr. Kugle: I think the question to the prior witness was is there a defined term "successor in interest" anywhere in the Definition section of either the Statute or the Regulations, and the prior witness answered that no, he didn't see that definition.

Mr. Morimoto: Okay. And so is he going to clarify that? I mean, if there's no term to clarify, how is he going to do that?

Mr. Kugle: I think he is going to explain for you what that provision means in that section.

Mr. Morimoto: What the term "successor in interest" means?

Mr. Kugle: As it's used in that section.

Mr. Trask: And the Department would just reply a couple things. One, the Department does believe this is an appropriate subject for argument; what is a successor in interest, what is an Assignee, what is proper. And although we'd argue there's no ambiguity, you can go into the legislative history. There is a defined process within the law, statutorily HRS 114, 115, and 116--

Mr. Morimoto: And we're talking about stuff that's like on paper, in print, approved, authorized, you know, like, it's the law, correct?

Mr. Trask: We would argue that, but also, as it specifically pertains to Mr. Unebasami, per his own testimony, he was in the State Procurement Office in various shapes and forms from '94 to 2000. If you look at HRS 103D-304, which is the Professional Service...real briefly. It has been amended in 2000, 2003, and 2004. So that would be beyond the scope of when he was even there, if it even matters, so we would still argue lack of foundation on the factual circumstance

that he's not likely to be able to testify to subsequent amendments because he wasn't there anymore. And so we just still object and we (inaudible) our initial objection as to their offer of proof and the relevance of this person. Not to denigrate his experience and expertise, but we just think it's improper.

Mr. Chun: Again, the questions that were asked had to do with the rules; the rules as submitted and stipulated by the parties, 1997. I don't know what the County Attorney is now (inaudible) talking about amendments to 103D that happened subsequent. But we're just talking about the rules, which was stipulated, which were done in 1997. There's nothing in the rules that was stipulated to show that it was amended since then. So using...I think that's a red herring by Mr. Trask about the amendments to 103D when we're talking about just the rules.

Mr. Morimoto: So your intent is to have him define terms that are not defined in the Statute?

Mr. Chun: He will testify as to what the intent of the rules were and the definition...not the definition, but how the rule was intended to be interpreted and applied. And he was the person that was going through and adopting the rules and promulgating the rules. So if the Commission wants to go through his background regarding that, starting from 1997 then—

Mr. Morimoto: But Mr. Unebasami didn't promulgate and pass the rules. Did he sign them? Did he—

Mr. Chun: Can we—

Mr. Morimoto: Did he approve them?

Mr. Chun: If I may, Mr. Chairman? If the objection was sustained, we can go back and have Mr. Unebasami go back in detail in terms of (inaudible) involvement in 1997 with the promulgation of the rules. He was stopped from doing that earlier.

Mr. Morimoto: Right.

Mr. Chun: So we can continue that if that is what—

Mr. Morimoto: No, he was stopped from doing that. How can you go back and open it up?

Mr. Chun: Because the objection was...if I may? The objection was raised regarding the background and the foundation. We can go through the foundation. Part of the foundation is his involvement with the rules back in 1997. So unless you don't want to hear about his background and foundation and you are going to uphold the objection and not allow us to raise the foundation, then that's your choice. But I think it's kind of interesting when you say there was no foundation and I'm not going to let you prove that foundation.

Vice Chair Ho: I need a recess, please.

Mr. Chun: That would be fine.

Vice Chair Ho: 5 minutes.

The Commission recessed this portion of the meeting at 2:55 p.m.

The Commission reconvened this portion of the meeting at 3:03 p.m.

Vice Chair Ho: We are back in session. Before we start, there are two (2) Commissioners that wish to ask a question before we start.

Mr. Chun: Sure.

Vice Chair Ho: Ms. Streufert.

Ms. Nogami Streufert: Yes. Mr. Unebasami, I have a...actually this is not just for you but I find the context of the State law extremely interesting because it tells me how it was developed and why it was developed. Before, in an earlier meeting, and my memory may not be accurate on this so I would like to have an interpretation of it, I was under the impression that although State law supersedes County law, the State had given the authority, responsibility, and the administrative ability to do its own procurement, to set its own procurement policies in conjunction with State law or under the State law, but that the counties could come up with their own procedures. Is that correct or is that not correct? Is there only one for all State and all County that is one in the same? Or are there differences between the County and the State?

Mr. Unebasami: It's one in the same. Chapter 103 states that there will be procurement organizations; each county is its own organization. It has its own Chief Procurement Officer. You have four (4) counties, four (4) Boards of Water Supply, the DOE, University of Hawai'i, OHA. The State Procurement Administrator, which I was, holds two (2) hats; you are in charge of 103D and all the Chief Procurement Officers and I was also a Chief Procurement Officer. The purpose of 103D was to make sure that vendors, when working with any of these establishments, worked with the same rules.

Ms. Nogami Streufert: And if, for example, a contract was given to Mr. Chun, for example, and God forbid, but if something were to...he moved out of state or whatever and he could not complete his assignment, what would happen at that point? Is that the successor, or assignment, or assignee, or successor in whatever?

Mr. Unebasami: Okay, so let's say it is the County of Kaua'i. The County of Kaua'i, at that point, would make a decision. Is it for the best interest of the County of Kaua'i to either stop the contract at that point because he cannot finish? Or hold him liable for that and make sure that he can have a proper...like a successor to finish his obligation to the County of Kaua'i.

Ms. Nogami Streufert: Or if he is in an organization, like he is now, could that be assigned to someone else in the organization with the same qualifications that he has?

Mr. Unebasami: Again, it would be up to—

Ms. Nogami Streufert: To the County.

Mr. Unebasami: –the County’s Chief Procurement Officer to look at all the circumstances and in writing, put it in writing at that time, what he said is okay or not okay.

Ms. Streufert: Okay. Thank you.

Vice Chair Ho: Mr. Mahoney.

Mr. Mahoney: Yeah, I have a few questions. Does part 7 of Chapter 103D contain the exclusive remedies for violations of the Procurement Code?

Mr. Unebasami: I don’t have it right in front of me, but... 103D, what was that? I’m sorry.

Mr. Mahoney: Does part 7 of Chapter 103D contain the exclusive remedies for violations of the procurement code?

Mr. Unebasami: What are the numbers? 103D...

Mr. Trask: I think it is 704, for the record.

Mr. Unebasami: Yes, with its rules.

Mr. Mahoney: Okay.

Mr. Trask: Oh, wait. I’m...could I follow up on that question? What does that mean, “yes, but it’s just rules”?

Mr. Unebasami: No, no. Yes and with its rules.

Mr. Trask: And with. Okay, thank you.

Mr. Unebasami: Yeah.

Mr. Mahoney: Okay. So under 103D, who can void a contract?

Mr. Unebasami: It would be stated in the contract.

Mr. Mahoney: Does it say anything in Chapter 103D who can void it?

Mr. Unebasami: It would be part of your general terms and conditions of the contract.

Mr. Mahoney: Under 103D, who can suspend a contractor...alright. Does the Planning Commission have the authority with respect to the administration of 103D?

Mr. Unebasami: I think it would be assigned by your Chief Procurement Officer.

Mr. Trask: I would just object. I just think that this is in derogation of the law as clearly articulated by the Intermediate Court of Appeals of the Hawaii State Supreme Court under District Council 50 of the International Union of Painters and Allied Trade versus Saito, 121 Hawaii 182. It is cited on the Department's opposition under Section B, so we just object. It is not just the State statute and the rules. It is also as interpreted by the courts of the State of Hawaii. So we would just object against the competency and foundation. It's not correct.

Vice Chair Ho: Before we move into this, I will rule in favor of Mr. Chun. You may continue your questioning, Mr. Chun. Please keep it short.

Mr. Chun: Yeah, that is what the intent was; to try to shorten the testimony. So if I may? Mr. Unebasami, have you reviewed the documents that were provided by the County in regards to the assignment of the contract from Ayabe, Chong, Nishimoto, Sia and Nakamura to Harlan Kimura?

Mr. Unebasami: I saw the ones that you provided to me, yes.

Mr. Chun: And I will make the representation that all the documents that were provided to my office by the County Attorney's Office – in more than one (1) occasion, there were many occasions – were provided to Mr. Unebasami for his review. So after reviewing those documents, have you formed an opinion regarding the (inaudible) of the assignment of the contract from Ayabe, Chong, Nishimoto, Sia and Nakamura to Harlan Kimura under the procurement rules?

Mr. Unebasami: May I step back a bit?

Mr. Chun: Yes, go ahead.

Mr. Unebasami: One or two minutes.

Mr. Chun: Yes.

Mr. Unebasami: As I stated prior, the Model Procurement Code was developed by attorneys of the vendors and therefore, the vendors had the upper hand to make sure that they were treated properly. When I got in there and started the promulgation of rules, what we intended with the rules was to make sure that something like this, right now, would not occur. Okay? If you look at the rules, there are many places in the rules that say that you have to do things in writing at the time of a decision, a determination. And the whole purpose of that was...we had experienced that things were coming up with the AG's office in lawsuits that happened years before with nothing in writing. And so we were looking at documents and lawsuits with nothing to know what the environment was 2 years ago when that decision was done. The rules have a lot of places in there, and in this one, that says that you do it in writing, okay? So that when the State is questioned by the attorneys of vendors, you have it already in writing, so you would think that the State has the upper hand; the State meaning and all of its counties when I say "State". That is how the rules were promulgated, okay? That whenever there is a decision, it is in writing at that time because the environment at that time and the environment now – 5 years later – may be so

different, and trying to go back 5 years prior to figure out why it happened is almost impossible. So I tried as best as I could to put it in rules that the AG's agreed that it was okay; that we would use that to help the State to make sure that their decisions were upheld more than not, okay? So with this in mind, as I look at what happened here and all the documents that I saw, there were no notes in there. All it is is to say a contract was signed; therefore, he must have agreed. That is not what the rules are intended and stated. You had to put it in writing as to why you allowed something to occur that was not just part of the ordinary contract. And this was an assignment so there should be something in writing; why it was it for the best interest of the County to allow it to occur, and there was nothing. That is all I have to say.

Mr. Chun: So Lloyd, when you talk about concerns in your review, was there any concern in your review about the lack of any writing in regards to the qualifications of the Assignee?

Mr. Unebasami: Also, this assignment was interesting because it used the professional services method of procurement. We have that process and we always use this example, you wouldn't buy a heart surgeon on the low-bid method so that is why you have a professional services method in which you would have a committee of...

Mr. Trask: We just object right now.

Mr. Unebasami: Okay.

Mr. Trask: I thought the Petitioners weren't contesting the selection of the original contractor. Aren't we just talking about the Assignment?

Mr. Unebasami: Okay, but I was going to get there.

Mr. Trask: Okay.

Mr. Chun: I think he was going to get there. I know where he was coming from, but I mean, up to the Chair.

Vice Chair Ho: I can understand that, too, and I understand... Please continue, Lloyd.

Mr. Unebasami: So anyway, you know, like I said, the professional services method of procurement is based on an individual's qualifications for a particular type of service and it's a committee of well-knowledgeable people to say that this is the right person to pick off of a list. It is not advertised out. It was advertised out prior because it is on a list. To then have this person, and for this particular one, he needed to assign it because there was a conflict or... anyway, that is what I read, okay? So now you are allowing the person who is conflicted to pick the next person. And usually in your initial selection process, you don't have anybody in the Committee that is already conflicted to go and make a selection, so I felt that was odd. What would have trumped this thing is if I could have read somewhere in the procurement file that the Chief Procurement Officer, or the head of the purchasing agency, had a comment as to why he allowed this to occur. You know, then I would have something to look at to see if it was a

proper assignment or not, or why he allowed that process to occur, okay? So knowing that there was nothing in there, it seems very odd.

Mr. Chun: What about the actual qualifications as having somebody not associated with the conflict doing an independent review of the qualification of the Assignee?

Mr. Unebasami: Again, because of the lack of a process, a lack of a written determination to allow it to occur, I wouldn't be able to make any assumptions of that type.

Mr. Chun: That the Assignee was qualified or not.

Mr. Unebasami: That's right.

Mr. Chun: Would that be an important factor in determining whether or not the Assignee should be assigned as to whether or not he was qualified?

Mr. Unebasami: Again, you would go back to the initial reason why there was a procurement. There is nothing tangible that would support anything at this point.

Mr. Chun: In your review of the documents provided to you by the County, was there any resume that you could look at and review the qualifications of Mr. Kimura?

Mr. Unebasami: It wasn't in the procurement file.

Mr. Chun: Okay. Now, in regards to the actual assignment itself, the Assignment requires that the Assignor – in that case, Ayabe, Chong – also remained obligated under the contract. Do you recall that provision in the rule and in the contract?

Mr. Unebasami: Yes.

Mr. Chong: Okay. Would that have been proper under this particular situation due to the conflict of Ayabe, Chong, and Nishimoto?

Mr. Trask: Objection, lack of foundation, not competent to testify. I mean, he just said it was odd. There has been no showing that he is aware what...he has not stated what is clearly stated in the Assignment, which is the Consultant had previously defended the County in other matters. So what about...

Vice Chair Ho: I sustain it.

Mr. Chun: Let me rephrase the question.

Vice Chair Ho: Yes.

Mr. Chun: Okay. Mr. Unebasami, in regards to the assignment of the contract to Mr. Kimura and the obligation of Ayabe, Chong, Nishimoto, Sia, and Nakamura to continue its obligation

under the contract, what concerns did you have regarding that particular provision in the rule and in the Assignment?

Mr. Unebasami: Again, because of a lack of the head of the purchasing agency or the Chief Procurement Officer to have something in writing as to why it was allowed, again, it would be more negative than positive.

Mr. Chun: Okay.

Mr. Trask: Objection, vague and ambiguous as to "more negative or positive". It is subjective.

Mr. Chun: What did you mean by "more negative than positive"?

Mr. Unebasami: Because there is nothing in writing, again, for anybody to read into why this occurred and should it be read as it being proper.

Mr. Chun: Based upon your review of the Assignment Contract, which I believe it's Exhibit I in the package on your right side and Exhibit P, I believe, also; I and P. What concerns did you have regarding the transferor being able to remain liable under the contract based upon the provision in the Assignment itself, which states that it becomes necessary for the consultant to assign this contract due to alleged conflicts of interest? What concern did you have regarding that?

Mr. Unebasami: The original contractor would not be able to fulfill this obligation.

Mr. Chun: Okay. And if the original contractor was not able to fulfill its obligation, would the Assignment have been improper?

Mr. Unebasami: Again...I mean, logically speaking, then the Assignment would be improper.

Mr. Trask: Objection as to "logically speaking". Is there any legal foundation to these determinations? Is there any rule or case or State statute that substantiates anything here? We think not.

Mr. Chun: Is that an objection or just an argument at this time?

Mr. Trask: It is a detailed objection because it goes to the foundation and competency arguments you make. I can't follow this thing, or the Department can't follow it.

Vice Chair Ho: Sustain that.

Mr. Chun: So sustained in terms of...? My next question or...? Or what portion of the answer of Mr. Unebasami so I can rephrase the question. I don't want to be difficult. I just want to make sure I meet the concerns raised by the Commission.

Mr. Mahoney: I think what the County Attorney said. Some of its ambiguous; vague and ambiguous. If there was specific case law to cite, to backup what you are saying, that would bring the point home better, I think. But maybe some of the terminology or phraseology he is using seems vague and ambiguous to me.

Mr. Chun: If I may? Because I am trying not to argue legal stuff because I am just trying to get a determination from this witness, but I just want to say the legal argument cases, decisions, and interpretations can be left for final briefing at this point in time. I don't think the Commission wants to hear well I cite to this case, this case, this case because that will extend time. If the objection is that yeah, he shouldn't be hedging his questions or his answers in ambiguous terms, I understand that one so I can ask him to do that again.

Mr. Mahoney: That would be a start.

Mr. Chun: Okay. So, I mean, I am just trying to meet the concerns of the Commission; that's what I'm trying to say. If I am allowed, if the Commission Chair wants, I can ask the question again and ask him to be more precise in terms of his answer.

Vice Chair Ho: Please do.

Mr. Chun: Okay, thanks. Mr. Unebasami, in regards to Exhibit I and Exhibit P, both have the same language in there, both of them have a provision in there regarding the consultant, and I will quote it verbatim because I don't want to mislead anyone. It says, "WHEREAS, it has become necessary for the Consultant to assign this Contract due to alleged conflicts of interest raised by various parties engaged in administrative litigation for the Planning Commission as the Consultant has previously defended the County in other matters"; that is one paragraph in both I and in P. And recognizing, in two (2) "WHEREAS"'s down, that in part B which is also in the rule, "The transferor remains liable for all obligations under the contract but waives all rights under the contracts against the State" or the County. What specific concerns – and if you can be specific and clear in terms of what the concerns were – do those two (2) provisions, in conjunction with each other, have in regards to your evaluation?

Mr. Unebasami: I will try to be more precise with my language. I will go back again. Because there isn't any written determination by the Chief Procurement Officer at the time of this thing that was allowed, I think this Assignment is wrong.

Mr. Chun: In regards to the obligation to remain liable, how does that apply?

Mr. Unebasami: Again, because I don't know what the Chief Procurement Officer had in mind to allow this to occur, I wouldn't be able to answer that. Now if you are asking me what I would do, that is something else, but I don't think that is what was asked so I am not going to answer that.

Mr. Chun: No, I didn't ask you what you would do. In regards to conflicts, if the Consultant was in conflict and it had been necessary to assign it because of a conflict, could the transferor remain liable for his obligations?

Mr. Unebasami: Again, because of lack of writing—

Mr. Trask: Objection, it calls for speculation. It sounds like he is just going to keep on saying because of lack of written determination, he can't make that call, and so asked and answered I guess. It's going to be the answer to all these things.

Mr. Chun: I don't know what he was going to answer.

Vice Chair Ho: Continue, Lloyd.

Mr. Unebasami: In essence, I was going to say that, again, because there is nothing in writing for us to read to know what the Chief Procurement Officer would have said why there is or there isn't a conflict and to allow this to occur, it shouldn't have occurred.

Vice Chair Ho: A moment please.

Ms. Nogami Streufert: Is it not...where it says, "WHEREAS, it has become necessary for the Consultant to assign this Contract due to alleged conflict of interest", isn't that enough of a determination that someone has determined that...isn't it enough of a statement that there has been a determination that there is a conflict of interest and it would be in the best interest of the County then to assign this to a successor? I mean, what kind of statement, I guess...I am looking for what exactly is it that you are looking for when you say that it has to be something written because this, to me, seems like it is already written. There is a conflict of interest, or potential conflict of interest, and therefore, it has to be reassigned.

Mr. Unebasami: Yeah, okay, that is what is stated that there is a conflict and there needs to be an assignment.

Ms. Nogami Streufert: Right.

Mr. Unebasami: But the Chief Procurement Officer has to agree in writing to allow the assignment to occur. There is nothing in writing that someone made a determination to allow the assignment to occur. For him to just sign the contract, we don't know what is in his mind and that was the whole purpose of the rules; to make sure that we understand why actions occur.

Ms. Nogami Streufert: But the Chief Procurement Officer, in this particular case according to Mr. Barreira, is the Director of Finance and he has signed this, as well as the County Attorney and the Planning Director and the Consultant, also. Is that not a written statement that has said all of these people have determined that this is in the best interest of the County? I mean, isn't that a written statement and acknowledgement by all parties that this is in the best interest of the County? Because it is written that it is "whereas there is a..." And I am not a lawyer, okay, but it appears to me that, logically, it would follow that if you've got something like this and then you have something that is signed by all of them, to include the Chief Procurement Officer of the County, then that would be a tacit agreement that this was something that was in the best interest.

Mr. Unebasami: I can answer that?

Mr. Chun: Yeah, you can.

Mr. Unebasami: I would say no.

Ms. Nogami Streufert: And why?

Mr. Unebasami: Because it has to be a separate determination; why he is allowing it to occur.

Ms. Nogami Streufert: Could that not be verbal or an agreement?

Mr. Unebasami: No, it has to be in writing.

Ms. Nogami Streufert: And this is not enough of a writing?

Mr. Unebasami: We need to know what was in his mind to allow that assignment to occur; that in his mind why, even with all of these things, it is going to be allowed for the best interest. What is the best interest of the County? He has to make a determination in writing, not just to say it is in the best interest of the County. Why was it in the best interest of the County for this to occur, this assignment to happen?

Ms. Nogami Streufert: Okay.

Mr. Unebasami: Again, I can't read his mind so all I am saying is by having a written document is not that.

Mr. Mahoney: If I may? The contract and all those signatures....you are saying that there should have been some other document in writing besides the contract signed by all interested parties?

Mr. Unebasami: Yes. As an example, if I don't go out to bid and everybody signs the contract, is that contract good? And the answer is no.

Mr. Trask: Objection, it misstates the law. There is specific standing and timing requirements to determine whether or not that is good or not. Objection, it's a misstatement of the law.

Vice Chair Ho: Sustained. Mr. Chun, do you have much more to (inaudible)?

Mr. Chun: Not much, but I just have some follow through questions from the Commissioners if I may? Mr. Unebasami, I believe Commissioner Streufert's position or question was assuming that, because it says in the contract, that there was a determination made by the parties there that there was...it becomes necessary for the Consultant to assign because of an alleged conflict of interest. Taking that as a fact now, is there a concern raised in that assumed fact and in regards to the fact that the transferor needs to remain liable for all obligations? I think that is what the heart of the question was.

Mr. Unebasami: Yeah. I would think the new contract would stipulate all of those things but, again, there still needs to be another document to allow this contract to proceed for signatures.

Mr. Chun: I mean, I think the question was can the transferor still remain liable if the Contractor is in conflict?

Mr. Unebasami: Oh, I'm sorry. I don't think so.

Mr. Chun: And why not?

Mr. Unebasami: He is in conflict, so if his Assignee is going to default for whatever reason, he cannot fulfill the contract because he is already in conflict.

Mr. Chun: Okay. Because the Assignor is in conflict, if we are assuming that, then he cannot fulfill the obligations.

Mr. Unebasami: Yes.

Ms. Nogami Streufert: But it's not Kimura who has a conflict. It's Ayabe and whatever...I'm sorry I don't remember all the names, but they were the ones who signed it, then they are the ones who assigned it, so I don't understand. There is no conflict of interest for Mr. Kimura to the best of my knowledge based upon what I see here.

Mr. Chun: The question I had was under the Assignment Contract, it requires the transferor, which is Ayabe, Chong, Nishimoto, and Sia to remain liable under the Contract for all obligations. So the question I asked is, can Ayabe, Chong, Nishimoto, Sia, and Nakamura remain liable under the Contract if it is in conflict, if it is determined that they were in conflict?

Mr. Trask: We would just object as to vague and ambiguous because the hypothetical is so broad. What would that obligation be? There has been no foundation to show Mr. Unebasami knows what the initial conflict was. There has been no showing that he is even familiar with the Rules of Professional Conduct governing the attorneys in the State of Hawaii. He knows nothing; only that he says there is a lack of written determination which, as of yet, he has not shown is even required in the rules or the law, one of which apparently he had participation in. So this is all speculative at that point. There may be some obligations that they can. Anyway, I will reserve a lot of this for cross. I don't want to get too far afield, but we just object to this line of questioning in that there is no foundation, his competency is lacking.

Vice Chair Ho: I support that.

Mr. Chun: I was just explaining to the Commissioner in terms of what...we were not saying that the Assignee is in conflict; we are not saying that. We are saying that the Assignor, if he is in conflict, can he continue to be under the obligations; that was the question.

So Mr. Unebasami, in regards to your earlier testimony today regarding the procurement system within the State of Hawaii, is the County of Kaua'i subject to the rules and regulations adopted under 103D?

Mr. Unebasami: Yes.

Mr. Chun: Can they take any actions that are inconsistent with or in violation of the rules and regulations promulgated under 103D?

Mr. Unebasami: No.

Mr. Chun: Okay. Now, you testified that...and I believe the testimony from earlier was that the County of Kaua'i...or the understanding is the County of Kaua'i is its own procurement organization. Does that mean that it is not subject to any of the State procurement rules and policies?

Mr. Unebasami: No.

Mr. Chun: And why not? Could you explain that system a little bit more in terms of what oversight the State Procurement Officer has in terms of other agencies?

Mr. Trask: Objection, the law speaks for itself.

Vice Chair Ho: It does. I sustain your objection.

Mr. Trask: It's clearly stated.

Mr. Chun: So in regards to remedies, if there is a violation of the State Procurement Law and/or the rules and regulations, other than filing a procurement protest, are there other avenues in which the public could object to a procurement?

Mr. Unebasami: There are rules and steps that you have to go through step-by-step.

Mr. Chun: Okay. But those rules just apply as according to the (inaudible) procurement officer only applied to...does not apply to this particular situation; to assignments, you were saying.

Mr. Unebasami: I don't know.

Mr. Chun: Okay. I have no further questions.

Mr. Trask: I just have a few.

Vice Chair Ho: Mr. Trask, before we start, I would like to take a recess. Let's come back at 4:00 please.

Mr. Chun: Okay. How long were we—

Vice Chair Ho: Ten (10) minutes, please; ten to 4:00 come back.

The Commission recessed this portion of the meeting at 3:40 p.m.
The Commission reconvened this portion of the meeting at 3:52 p.m.

Vice Chair Ho: We will be back in session right now. I believe Mauna Kea–

Mr. Chun: Yeah, I will just say for the record, I have no further questions. I just want to check with anyone behind me. Intervenors? Okay.

Mr. Trask: Thank you, Your Honor. Mr. Unebasami, you said you are totally retired as of...what? 2011?

Mr. Unebasami: Yes.

Mr. Trask: But you are still a consultant, right? So you are retired from the State but you still have your own private practice.

Mr. Unebasami: Yes.

Mr. Trask: Your consultant work is procurement, organizational structure, and internal control review and establishment, correct?

Mr. Unebasami: Yes

Mr. Trask: And that pertains to State procurement?

Mr. Unebasami: It can be for the State or for a private entity.

Mr. Trask: Like Mr. Chun's clients and all the other petitioners, correct?

Mr. Unebasami: Yes.

Mr. Trask: What is your fee for consultant services?

Mr. Unebasami: It varies, but for this one I am not taking a fee. They are just paying my expenses here.

Mr. Trask: Really?

Mr. Unebasami: Yes.

Mr. Trask: How often do you waive fees in your consultant services?

Mr. Unebasami: Very often. I work with attorneys that I know and therefore, usually I just hand them my expertise on matters of procurement. If I am going into the organizational structure and internal controls, that would be something else.

Mr. Trask: Okay. So do you know Mr. Kugle? Greg Kugle? You look like no.

Mr. Unebasami: Yeah, I don't think...yeah, it doesn't ring a bell.

Mr. Trask: Do you know Mr. Barry Edwards?

Mr. Unebasami: Yes.

Mr. Trask: And how do you know Mr. Edwards?

Mr. Unebasami: His son and my son used to play baseball together.

Mr. Trask: Okay. And do you know Mr. Chun?

Mr. Unebasami: Yes.

Mr. Trask: And how do you know Mr. Chun?

Mr. Unebasami: He was...was it a senator?

Mr. Trask: He was! (Laughter in background) Yes.

Mr. Unebasami: That is how I met him.

Mr. Trask: He was a State Senator from 1998 until 2002, correct?

Mr. Unebasami: I'm not sure exactly when but yes, he was up there.

Mr. Trask: Okay. Did you have frequent contact with Mr. Chun during his term as a State Senator?

Mr. Unebasami: I met him, not very often, but I had to go to the Legislature every year to make amendments to the law or working on my budget to make sure that we had sufficient funds for the State Procurement Office.

Mr. Trask: Okay. And was he on a committee that gave you funds and stuff?

Mr. Unebasami: I don't recall already. (Laughter)

Mr. Trask: So you know Mr. Chun, you respect Mr. Chun?

Mr. Unebasami: Yes.

Mr. Trask: You like Mr. Chun?

Mr. Unebasami: Yeah.

Mr. Chun: Objection, vague and ambiguous. What do you mean "like"? (Laughter in background)

Mr. Unebasami: He is credible.

Mr. Chun: Okay, that's better.

Mr. Trask: And because of your relationship with Mr. Chun, you waived fees in this case?

Mr. Unebasami: Yes.

Mr. Trask: What is your normal consultant fee average?

Mr. Unebasami: Between \$150 and \$500 an hour.

Mr. Trask: And so I want you to turn to – on your left – Exhibit A. Also, for the record, this is Petitioner's 1, Hawaii Administrative Rules. Go to that 125-14 section.

Mr. Unebasami: Yes.

Mr. Trask: Okay, so I want you to read...and under 125, there are no other sections regarding Assignment aside from this specific section, correct?

Mr. Unebasami: I can't say for sure at this time.

Mr. Trask: But Mr. Unebasami, you are the expert in this situation so I expect you to know. Do you know?

Mr. Unebasami: No.

Mr. Trask: Okay. And there are no other State statutes, 103D, regarding Assignment, correct?

Mr. Unebasami: For the procurement sections, yeah, none.

Mr. Trask: There are none?

Mr. Unebasami: Yes.

Mr. Trask: So I want you to read that first paragraph. This is 3-125-14(1), No Assignment.

Mr. Unebasami: "No state contract is transferrable, or otherwise assignable, without the written consent of the Chief Procurement Officer or the head of a purchasing agency provided that a contractor may assign monies receivable under a contract after due notice to the State."

Mr. Trask: Okay. So where does it say in that rule that you need a written determination?

Mr. Unebasami: It is without the written consent of the Chief Procurement Officer.

Mr. Trask: Mr. Unebasami, I am not an expert in procurement but I can read. Where does it say written determination, is my question.

Mr. Unebasami: The words aren't there but the written consent is, as far as I am concerned, a determination.

Mr. Trask: Okay. And that is your opinion?

Mr. Unebasami: Yes.

Mr. Trask: Okay. But it doesn't say that, does it?

Mr. Unebasami: No.

Mr. Trask: Under the procurement code, isn't it true, though, that it explicitly states that the Chief Procurement Officers do have to make "written determinations"?

Mr. Unebasami: Yes, it is all over the...

Mr. Trask: All over.

Mr. Unebasami: Yeah, it's all over.

Mr. Trask: It's its own term of (inaudible) correct?

Mr. Unebasami: Yes. That was the intent that we wanted to have in there, like I stated prior.

Mr. Trask: And you know that because you effectively helped write this, right?

Mr. Unebasami: Yes.

Mr. Trask: Okay. In fact, 103D-318, Finality of Determination, states "The determinations required in sections 103D-302(g), 103D-303(a), 103D-303(g), 103D-306, 103D-307, 103D-310, 103D-312(c), 103D-313, and 103D-314 shall be final and conclusive unless they are clearly erroneous, arbitrary, capricious, or contrary to law, correct?"

Mr. Unebasami: Yes.

Mr. Trask: Yes. So just as an example, for 103D-302(g)...and for the record, 103D-318 makes no reference to require written determinations under 103D-304, Professional Service Procurement, correct?

Mr. Unebasami: I'm not sure.

Mr. Chun: Objection, if they are going to be reading, I think they should at least give the witness a copy of it. Thanks. I want the record to know he doesn't have it in front of him.

Mr. Trask: So look at 103D-302(g). This is the final sentence on 103D-302(g). It says, "Except as otherwise provided by rule, all decisions to permit the correction or withdrawal of bids, or to cancel awards or contracts based on bid mistakes, shall be supported by a written determination made by the Chief Procurement Officer or head of a purchasing agency", right?

Mr. Unebasami: This is different.

Mr. Trask: Okay, so here, I'll show you. For the record, this is as it pertains to competitive sealed bidding because, again, a written determination isn't required in 304, but the last sentence discusses written determinations made by the CPO that needs to be put in the procurement file, correct?

Mr. Chun: If I may just raise an objection for the record that we are not asking the Planning Commission to cancel an award of contract in this particular one. We are asking the Commission not to appoint Mr. Kimura as a Hearings Officer. Those are two (2) separate items.

Mr. Trask: Okay.

Mr. Chun: And if we are going to go through whatever the statute says again, then I would go back to what the statute says is what the statute says and we can all use that for argument rather than ask the witness to read a statute and take time and say yes I read it and that is what it says.

Mr. Trask: For the record, the reason why I am making this statement right now, or the department is, is because Mr. Unebasami, for minutes, referred to written determination where that wasn't stated in the statute. He wasn't reading from the statute. It does not appear. However, it does appear in other statutes and so therefore, the argument is if he is saying written consent is written determination, then why is written determination everywhere in the Procurement Code and nowhere in the HARs?

Mr. Chun: Again, that was not the question asked and I was just raising the objection as to the questions asked.

Mr. Trask: Okay. I'm almost done.

Vice Chair Ho: Continue, Mr. Trask.

Mr. Trask: Mr. Unebasami, you stated that these statutes were written by the vendors' lawyers, correct?

Mr. Unebasami: Yes.

Mr. Trask: But the rules were written by you.

Mr. Unebasami: And my staff.

Mr. Trask: And your staff.

Mr. Unebasami: With the support of the AGs.

Mr. Trask: Okay. So did you specifically write 3-125-14?

Mr. Unebasami: I specifically did not write it.

Mr. Trask: You did not write it.

Mr. Unebasami: I specifically did not write it.

Mr. Trask: So who, then, did specifically write it?

Mr. Unebasami: The staff and the AG's office.

Mr. Trask: Okay. So then how come you didn't ensure that they wrote written determination as opposed to written consent?

Mr. Unebasami: I'm not sure.

Mr. Trask: Okay. So what does consent mean to you? Because no definition is provided in the HARs. Just the word "consent". Abstractly, what does "consent" mean?

Mr. Unebasami: To agree.

Mr. Trask: To agree. So I am going to have you look at – on your right – Exhibit I, and that is the Assignment of Contract 8599.

Mr. Unebasami: Okay.

Mr. Trask: First page. At the bottom of the page, the last "WHEREAS" clause, it states "The County, the Consultant, and the Assignee mutually agree to the assignment of this Contract performance at the same unit prices and under the same terms and conditions as specified in the Contract", correct?

Mr. Unebasami: Correct.

Mr. Trask: Okay. So because “consent” means agree and you participated in the writing of the HARs saying "no contract shall be assigned without the written consent or the written agreement of the CPO"...turn to the third page of that. Under County of Kaua'i, it has a Director of Finance, correct?

Mr. Unebasami: Yes.

Mr. Trask: But you are saying that although it says that the County via the Director of Finance agrees, this is somehow not a written consent although it is a written agreement.

Mr. Unebasami: He is agreeing to the contract.

Mr. Trask: The assignment of it, right?

Mr. Unebasami: No, he is agreeing to the terms of the contract.

Mr. Trask: Well it says right here, “WHEREAS the County, the Consultant, and the Assignee mutually agree to the assignment of this Contract.”

Mr. Unebasami: Again, I take this as he is agreeing to the language of the contract. Now, what I was saying is that there is nothing in writing for us to understand from him that he agreed to even having this contract. What was his...where is his decision and what did he go through to agree to having this assignment?

Mr. Trask: Mr. Unebasami, where is the rule that requires such a written determination?

Mr. Chun: Objection, asked and answered.

Mr. Trask: You are right. He said none so we will rest on that. So, moving on.

Mr. Chun: No, he said the written consent under 3-125-14(1) and there was an argument between them regarding the meaning of the word “consent”. But his earlier testimony was those are the rules he is relying on.

Mr. Trask: But then the question would therefore be different because I said where does it require a written determination?

Vice Chair Ho: Yes, Mr. Trask.

Mr. Trask: Thank you. So, moving on from this, how come you didn't write that, though, in the rules?

Mr. Chun: Asked and answered. He already testified and he said he didn't know.

Vice Chair Ho: Yes.

Mr. Trask: Is it your position, then, that the rules can supersede State law?

Mr. Unebasami: The rules have to be consistent with the State law.

Mr. Trask: Okay. Finally, you do agree that the Procurement Code has specific standing and exclusive remedy provisions limiting challenges to bidders, offerors, and contractors, correct?

Mr. Unebasami: Yes.

Mr. Trask: You would agree that only three (3) parties can challenge a procurement, and they are any actual or prospective bidder, offeror, or contractor who is aggrieved in connection with the solicitation or award of a contract, correct?

Mr. Unebasami: If that is what was written, yes. It has been a while so I would have to read up on it again if that was correct or not, but yeah.

Mr. Trask: I am going to refer you to 103D-701. Refer you to the first sentence in (a), and it states, "Any actual or prospective bidder, offeror, or contractor who is aggrieved in connection with the solicitation or award of a contract may protest to the Chief Procurement Officer or a designee as specified in the solicitation", correct?

Mr. Unebasami: Correct.

Mr. Trask: And nobody else can, right?

Mr. Unebasami: According to this language, you would say no one else can. If I recall...and I am sorry because I have to recall. If I recall my discussions with the AG's office, there are other sections in the law that allows even things that are here for them to cite other sections that anybody can come up with a grievance.

Mr. Trask: Okay. So I am going to cite to you. The Hawaii Supreme Court via the Intermediate Court of Appeals held in the District Council v. Saito case...

Mr. Chun: I am going to object in terms of questioning a witness regarding what the Supreme Court or Intermediate Court of Appeals held. Again, that's legal arguments. I think the Commission has already said that legal arguments can be left for final arguments and not for questioning with witnesses. But I'm just going to (inaudible) that calls for legal conclusions. He wasn't called as a lawyer.

Mr. Trask: In the Department's defense, Mr. Unebasami's entire testimony was legal argument. He has, and the record clearly shows, talked about requirements that aren't founded by State statute, requirements that aren't founded within Administrative Rules, and now he's trying to...wait, I'm sorry.

Mr. Chun: No, I am going to object in terms of...he is trying to argue his issue...stick to the objection, not arguing your case again and again in front of the Commission.

Mr. Trask: I am trying to ask...for the record, my offer of proof is I am trying to ask Mr. Unebasami, because he can disagree with the statutes that are clearly written, does he also think he can disagree with the Hawaii Supreme Court?

Mr. Chun: Again, the objection was he is asking questions regarding a Supreme Court decision. What relevance is that? The decision is the decision. The question wasn't do you disagree with the Supreme Court decision.

Mr. Trask: Well, then I would move to strike his entire testimony.

Mr. Chun: That is a different issue.

Vice Chair Ho: Calm down, gentlemen. Calm down, calm down, calm down. Mr. Chun, I will let Mr. Trask continue. Please.

Mr. Trask: Thank you. Mr. Unebasami, the court held in that case that only three (3) parties can challenge a procurement process and they are any actual or prospective bidder, offeror, or contractor. Is your intent contrary to what the Supreme Court has said?

Mr. Unebasami: No.

Mr. Trask: Okay. No further questions.

Mr. Chun: No further questions.

Vice Chair Ho: Let me take a 5-minute recess to confer with Mr. Morimoto. Thank you.

The Commission recessed this portion of the meeting at 4:10 p.m.

The Commission reconvened this portion of the meeting at 4:13 p.m.

Vice Chair Ho: Mr. Morimoto.

Mr. Morimoto: Mr. Unebasami, you had a hand in writing Chapter 103D of the Hawaii Revised Statutes?

Mr. Unebasami: Yes.

Mr. Morimoto: What part did you have a hand in writing? The entire chapter?

Mr. Unebasami: Yes. "Hand" meaning I was responsible to make sure that all the rules were promulgated. You know, I am the Administrator, so I had a staff and a couple of fantastic AGs and we went through the process of what the intent of what we were trying to create.

Mr. Morimoto: In doing this review in order to promulgate the rules, you had to review the entire chapter, correct?

Mr. Unebasami: Oh yes; piece by piece.

Mr. Morimoto: Are you familiar with part 7 of Chapter 103D?

Mr. Unebasami: Not particularly when you say it that way.

Mr. Morimoto: Turning you attention to Section 103D-704.

Mr. Kugle: Could I, Chair, just object that I think Corporation Counsel is stepping out of the chair of advisor and into the chair of an advocate. I think Mr. Trask did a fine job cross-examining and I think I would stand on that objection.

Mr. Morimoto: The Commission had questions that they are asking me to clarify, so if you have objections to the clarification, let us know now.

Mr. Kugle: I stated my objection.

Mr. Chun: I don't have an objection as far as the Commission members asking questions (inaudible), but I just want to avoid any kind of appearances. I just want to join in the objection that if the Commission has any questions, no problem here. It's just that I'm not quite sure where the questions are coming from. But that's fine. I want to avoid having to breeze in the record the two (2) attorneys from the same office. I want to make sure it is clear and I don't want to raise that so I just want to make sure that you guys are aware of that possible issue, which I don't want to—

Mr. Morimoto: I am raising these questions on behalf of the Commission, not on behalf of the Department.

Mr. Chun: And that's fine. I just—

Mr. Morimoto: And I have not consulted with the Department or any of the county attorneys representing the Department. I have no idea what their thoughts are, except for what they have put to paper.

Mr. Chun: That's fine. We just...so we can put it on the record.

Mr. Morimoto: And neither does the Commission, so we are just trying to get some clarification here. Is that okay?

Mr. Chun: Yes. Based upon your representation that these are based upon questions from the Commission members, fine.

Mr. Morimoto: Do the Commission members have any objection to my asking Mr. Unebasami questions?

(Unanimous voice approval to ask questions)

Mr. Morimoto: Mr. Unebasami, 103D-704 talks about the exclusivity of remedies, correct?

Mr. Unebasami: Correct.

Mr. Morimoto: And the procedures and remedies provided for in this part, meaning part 7 of 103D and the rules adopted by the Policy Board, are the exclusive means for persons aggrieved, correct?

Mr. Unebasami: Correct.

Mr. Morimoto: And in fact, when you look at Section 3-126-38 of the rules...are you familiar with that section? It is in front of you.

Mr. Chun: Was it 125 or 126?

Mr. Morimoto: No, 126-38.

Mr. Chun: I don't think he has 126 in front of him. He has 125 (inaudible). If I may? Exhibit A is 125.

Mr. Morimoto: Excuse me. My bad. Are you familiar with 126-38?

Mr. Unebasami: Not off hand right now.

Mr. Morimoto: Let me show it to you.

Mr. Unebasami: Okay, so...I'm sorry.

Mr. Morimoto: Okay. So aside from what is in the Hawaii Revised Statutes in 103D itself and in that particular section, are there any other remedies available to someone who is aggrieved by the award of a contract or the assignment of a contract?

Mr. Unebasami: If I recall right, it can go all the way up to the Circuit Court.

Mr. Morimoto: Right, but are there any remedies? By "remedies" I mean voiding the contract, suspending the contract, terminating the contract, and so on and so forth. Are there any other remedies available to someone who is aggrieved by the award of a contract or the assignment of a contract?

Mr. Unebasami: No.

Mr. Morimoto: With regard to violations of Chapter 103D, the kind that you described in your testimony, what role does the Planning Commission have in or what authority does the Planning Commission have in remedying those violations or correcting those violations under 103D and under the regulations?

Mr. Unebasami: It would follow what your Chief Procurement Officer can do.

Mr. Morimoto: No, no, no. What role does the Planning Commission...under Chapter 103D or under the rules, what role does the Planning Commission play in remedying violations of the Procurement Code?

Mr. Unebasami: I don't know.

Mr. Morimoto: Does the Planning Commission have any role in remedying violations of the Procurement Code?

Mr. Unebasami: Again, because I am not sure how your Chief Procurement Officer assigned anything down to the Commission--

Mr. Morimoto: I am specifically referring to the rules and the statute. Is there anything in the rules or in the statute that authorizes the Planning Commission to remedy violations of the Procurement Code?

Mr. Unebasami: No, only the various Chief Procurement Officers.

Mr. Morimoto: Okay. So the Chief Procurement Officer and who else?

Mr. Unebasami: And his designees as head of purchasing agencies.

Mr. Morimoto: So this body doesn't have any jurisdiction to entertain complaints about violations of the Procurement Code then, right?

Mr. Chun: I raise an objection, even though it is a Commission question, it goes beyond his expertise and what he is being called to. He was just being called in regards to the Procurement Code, not the jurisdiction of the Planning Commission.

Mr. Morimoto: Well, I am asking specifically about the Procurement Code. So under the Procurement Code and under the rules that you helped to draft--

Mr. Chun: If I may, Mr. Chair. I just want to follow process. I raise an objection. I don't want to argue. I just want to follow process, so that was the objection; that he was testifying only as to the Procurement Code. The question that was asked, just before, had to do with the Planning Commission's jurisdiction.

Mr. Morimoto: Correct. So, under the rules--

Mr. Chun: So I was just raising that objection.

Mr. Morimoto: Thank you. Are you done?

Mr. Chun: I just wanted to know if the Commission was going to address the objection.

Vice Chair Ho: Overruled.

Mr. Unebasami: Ask your question again.

Mr. Morimoto: Okay. Under Chapter 103D and under the rules that you helped to draft, what authority does the Planning Commission have to remedy violations or alleged violations of the Procurement Code?

Mr. Unebasami: May I ask a question back to you?

Mr. Morimoto: Sure.

Mr. Unebasami: Did the County's Chief Procurement Officer make a delegation down to the Planning Commission on procurement?

Mr. Morimoto: Not that I am aware of, no. In fact, I can represent to you that no—

Mr. Unebasami: Does the Commission make any sort of procurement?

Mr. Morimoto: Not that I am aware of.

Mr. Unebasami: Or its staff?

Mr. Morimoto: Not that I am aware of. But getting back to my original question—

Mr. Unebasami: Okay. I hear what you are saying. The Procurement Code is specific to its procurement organizations and its Chief Procurement Officers.

Mr. Morimoto: Right. And under the Code and under the regulations that you helped to draft, it is my understanding that the remedies are specific.

Mr. Unebasami: It is silent for you to make any kind of remedies unless so stated somewhere else.

Mr. Morimoto: And so my question is under the Code and under the rules you helped to draft, what authority does the Planning Commission have to entertain complaints about violations of the Procurement Code?

Mr. Unebasami: Specific to your question, within the Code it is none.

Mr. Morimoto: Thank you. That is it from the Commission.

Vice Chair Ho: Are there any other questions on the floor?

Mr. Chun: Just a follow through question. Mr. Unebasami, if the Planning Department's staff had a role in the procurement of a contract...because the Planning Commission would then have

some kind of role in the procurement process; it is the staff of the Planning Commission. In other words, we can say Michael Dahilig signed off on these assignments and the contracts, and he is a member of the Planning Commission. Would that fact play a part in your responses earlier?

Mr. Unebasami: No.

Mr. Chun: Last question, regarding Rule 126 that was referred to you, by definition, that rule only applies to persons who have made an offer or submitted bids, correct?

Mr. Unebasami: Yes.

Mr. Chun: Thanks.

Mr. Morimoto: Following up on Mr. Chun's question, who else can complain about violations of the Procurement Code besides bidders and offerors?

Mr. Unebasami: Again, I have to recall, okay? I think the AGs told me the general public still has a shot at this.

Mr. Morimoto: Okay. Setting aside what the...because what the Attorney General told you is probably a privileged communication and you probably don't want to talk about that to us; it's up to you. But what I want you to do is, and if you need to take time, review 103D and review the rules, and if you can find something in there, please let us know. Without relying upon what the Attorney General told you, I am asking you specifically about the Code and the rules, okay?

Mr. Unebasami: Okay.

Mr. Chun: Do you want the review time?

Mr. Morimoto: If he needs to take time to do that.

Mr. Unebasami: Not now.

Mr. Chun: Yeah, I mean, you just left it open. Do you want to take a break and have him--?

Vice Chair Ho: I believe he'll...I believe that we will...I'm sorry.

Mr. Morimoto: I have a suggestion. How about we give him time and he can submit something in writing. If he finds somethings in the rules or the Code that--

Mr. Chun: It wasn't my question, so...

Mr. Trask: The Department would object. I think this is clearly...you know, as we stated in our cross, we argue this is a settled legal matter. This is addressed in a case that we cite in our opposition.

Mr. Kugle: We will brief it as part of the closing stuff.

Mr. Morimoto: Actually, it should be part of...if he has testimony that he can submit regarding that issue, that's fine. I mean, you guys are free to brief whatever you want to brief.

Mr. Trask: The Department's position, just in the interest of time, we just...it's not there.

Mr. Chun: From our position, if it's in the ordinance, it is in the ordinance. So if it is in the rules, it is in the rules. And I would agree with Mr. Trask, if it's in the rules, it's in the rules. There is no need for testimony if it's in the rules.

Mr. Morimoto: Okay.

Vice Chair Ho: I believe we are at a point now where...you gentlemen want this meeting in writing and then you will file your briefs? Is that how we approach this now?

Mr. Trask: The Department's understanding and subject to the representation from counsel is that we have agreed to submit proposed Findings of Fact, Conclusions of Law, and Decision and Order within two (2) weeks after receiving a copy of the minutes from today because we would like to refer to them because we...the Department thinks this is likely an appeal to Circuit Court so we think the minutes would be an important part of that process; and Petitioners have that right. This is a contested case so we don't object to due process. As far as closing arguments today, we would agree to waive them today with the understanding that the parties may elect to speak at the appropriate time when this is agenda'd in the future for your adoption or modification of the proposed Findings of Fact, Conclusions of Law because we would have that opportunity anyway at that time. So just in the matter of saving time, we could wait until that day.

Vice Chair Ho: Are we looking at two (2) weeks for the filing and then, after that, two (2) more weeks for closing arguments?

Mr. Trask: The Department's understanding is the ability to set the agenda is the Chair's kuleana and so we would just request to receive the minutes, two (2) weeks thereafter – whenever that is – we will submit out proposed findings. And then of course, whenever you put it on the agenda, we will be here and then that could be within two (2) weeks thereafter or a month, or whatever your agenda is; that's your...

Vice Chair Ho: Is that acceptable to the attorneys? Mr. Kugle? Mr. Chun? Mr. Edwards?

Mr. Chun: Yes, that was discussed and we would agree. I think the other side benefit of that is with the completion of the written minutes, Mr. Lord will be able to review them and be cognizant of what was going on. So that would also help the Commission in regards to having something in writing that he could review prior to participating in the decision-making. I was just checking with the intervenors and they also need to consent to that process.

Vice Chair Ho: Do the Intervenors agree?

Mr. Morimoto: Can the Intervenors...in fact, can all the representatives for the parties come up and state on the record that you agree or consent to the process?

Mr. Chun: For my clients, Jonathan Chun, we would agree to that process.

Mr. Kugle: Greg Kugle, I agree for my clients as well.

Mr. Edwards: I have one minor matter to cover with you, which is some exhibits which I am going to offer into the record, and I agree with the process that has been outlined. Thank you.

Vice Chair Ho: One moment, Mr. Edwards. Ladies.

Caren Diamond: Caren Diamond, intervenor and I am in agreement with the process.

Barbara Robeson: Barbara Robeson, also an intervenor and I am in agreement with the process.

Vice Chair Ho: Thank you. Thank you. Mr. Edwards.

Mr. Edwards: The way things went on December 13th, many of you weren't here or at least a few of you weren't here, we really didn't get started, no evidence was really offered because of the continuance which was required. You will remember that. Because of that, I brought exhibits. I didn't provide them to anybody because the meeting got adjourned. I brought them back today. I have provided them for the county attorneys to look over. I want to offer them into the record as exhibits in this case. I have an agreement that they are authentic government records and a disagreement about whether or not you want to take them in, so that is where we are. I can describe what the documents are and why I believe that they are relevant to your consideration, if Mauna Kea Trask agrees that that is our agreement.

Mr. Trask: For the record, Mauna Kea Trask, County Attorney. The Department is willing to stipulate that these are authentic government records and some of them are requests for government records under Chapter 92F, I believe, of the UIPA, Uniform Information Protection Act. They are government records. They do pertain to...there was a request to the Planning Department, the Planning Department initially had determined that Mr. Kimura was acting as their attorney, they later said that...Mr. Edwards contested that, they later changed their determination and then subsequently turned over said records. So whereas the Department would stipulate for the limited purposes that they are authentic and therefore, Mr. Edwards doesn't have to call all the email people and his client who made the requests, we would reserve as to their relevancy, we would object in that regard, but that is subject to argument for you. And ultimately, we would say they are also irrelevant because the initial determination by the Planning Department obviously was incorrect and because later, they got their documents anyway. And it doesn't apply to my case; Guyer. It only applies to certain cases for the other deputies. So that's all.

Vice Chair Ho: I would say now that we should receive it.

Mr. Edwards: I brought copies and I will distribute those, or I can give them to whoever needs to distribute them. Aside from that, I take it we are going to do our arguing in writing after the minutes occur; that is the procedure we have agreed to so I will shut up now.

Vice Chair Ho: Excuse me, Mr. Edwards, we need a motion to receive your documents, please.

Mr. Edwards: I offer them into evidence. They are the Movant's Exhibits M1 through M5, and it's on behalf of Boilini/Levy, the Cowern's, and the Henry's; my clients.

Ms. Apisa: I move that we receive them.

Ms. Nogami Streufert: Second.

Vice Chair Ho: Moved and seconded. All in favor? (Unanimous voice vote) Motion carried 4:0.

Mr. Edwards: I'll distribute them. Thank you.

Vice Chair Ho: Yes, thank you very much.

Mr. Chun: I gather that all the parties have agreed to the procedure. I just wanted to put on record that there were documents that were provided to us by the County Attorney's Office – many times – and I want to thank the County Attorney's Office for providing those documents. And to the extent that they were relevant, they were all included in the package that you have in front of you. If there are other documents that are found later on, I would ask the County Attorney's Office if they find them, to also provide that to us. But I don't...I am not saying there are. It's just that we are open to it.

Mr. Trask: For the record, we appreciate working with Petitioners in this case. We try to minimize the advisory process as much as we can and there are no other documents that we can locate.

Mr. Chun: Okay.

Vice Chair Ho: Thank you. I need a motion to adjourn.

Mr. Mahoney: Chair, move to recess until all documentation is brought forth to us and rescheduled.

Ms. Nogami Streufert: Second.

Vice Chair Ho: All those in favor? (Unanimous voice vote) Motion carried 4:0.

At 4:38 p.m., the Commission moved to recess the hearing to a date to be determined.

Respectfully submitted by:



Darcie Agaran,
Commission Support Clerk

() Approved as circulated (add date of meeting approval)

() Approved as amended. See minutes of _____ meeting.